Office-Supreme Court, U.S.
FILED
DEC 2 0 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-Defendant With Wallis)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR FLOYD A. WALLIS.

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

Leonard's Brief Service "Specialists in Printing of Briefs", 2014 Clio St., N. O., La. 70113

INDEX.

INDEX—(Continued)

CITATIONS.

CITATIONS—(Cases Continued)

CITATIONS—(Cases Continued)

CITATIONS—(Cases Continued)

CONSTITUTION, STATUTES AND REGULATIONS.

CONSTITUTION, STATUTES AND REGULATIONS—(Continued)

TEXT AND MISCELLANEOUS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-Defendant With Wallis)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR FLOYD A. WALLIS.

A. OPINIONS BELOW.

The opinion of the United States District Court for The Eastern District of Louisiana, New Orleans Division, (R. 65) is reported at 200 F. Supp. 468. The original majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit (R. 78, 86) are reported at

344 F. (2d) 432, and, the majority and dissenting opinions on petitions for rehearing, filed on behalf of all parties, (R. 107, 114) are reported at 344 F. (2d) 439.

B. JURISDICTION.

The judgment of the Court of Appeals was dated and entered January 21, 1964 (R. 89). A timely petition for rehearing by Wallis, appellee, was filed February 10, 1964 (R. 91), and denied by order dated and entered April 20, 1965 (R. 107). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).[1] Timely petition for writ of certiorari was filed by Wallis, July 12, 1965, and this Court granted certiorari on October 11, 1965, by Order dated October 11, 1965 (R. 134).

C. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article I, Section 8, Clause 17:

§ 8.—The Congress shall have power . . . ,

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which

---

[1] § 1254. Courts of appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree; * * *

the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; * * *

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C. 181:

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 89-106.

Mining Law, 30 U.S.C. 26, 28; R.S. 2322, 2326:

The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 106-109.

Rules of Decision Act, 28 U.S.C. 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

D. QUESTIONS PRESENTED FOR REVIEW.

In June of 1954, Wallis filed five "acquired lands" applications seeking issuance of noncompetitive oil and gas leases on Federal lands in Louisiana, pursuant to The Mineral Leasing Act For Acquired Lands (hereafter referred to as 1947 Act).[2]

[2] Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, *et seq.* As respects lands owned by the United States and the granting of oil and gas leases thereon, Congress has passed two statutes, the 1947 Act and The Mineral Leasing Act of 1920 (hereafter referred to as 1920 Act); Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, *et seq.* The distinction between the two Acts as noted (Footnotes 7 and 9, R. 67, 68) by the trial Court (continued)

Prior to these filings, in March, Wallis and McKenna reached an oral agreement by telephone with reference to these "acquired lands" applications, and leases to be issued "under" them, which oral agreement was confirmed by a written letter agreement (Pl. Ex. "A", R. 2, 8) dated December 27, 1954.

Prior to Wallis' having filed his "acquired lands" applications, one Henry S. Morgan had filed applications for leases **under both the 1947 Act and the 1920 Act,** purporting, in each set of applications, to describe[3] the same property as that in Wallis' applications. A contest in the Department of Interior ensued between Morgan and Wallis over the merits of their respective "acquired lands" applications, with Morgan's "public domain" application under the 1920 Act lying dormant. During the pendency of this contest, and on March 3, 1955, Wallis executed an option agreement (Pl. Ex. P-1, R. 33, 40) with Pan American Petroleum Corporation (hereafter called "Pan Am") granting it the option to acquire leases issued to Wallis "under and by virtue" of his "acquired lands" applications. Approximately a year later, in March, 1956, Wallis filed a

---

([2] cont'd) is: " 'Acquired land,' as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called 'public domain land.' . . . The original Mineral Leasing Act of 1920, . . . , with certain exceptions not here relevant, applied only to public domain lands . . . Enacted to remedy this deficiency, the 1947 Act in terms applies only to 'acquired lands' not subject to lease under the 1920 statute . . ." *The trial Court further noted* (R. 68) that "the parties all agree" that if lands are in fact "public domain," an application under the "acquired lands" 1947 Act is "ineffective," and, *vice versa.*

[3] The Department of Interior ultimately held the purported descriptions in Morgan's applications, to be faulty and not in compliance with the law.

"public domain" application for a lease on the lands under the 1920 Act, and a contest then ensued with Morgan over their respective "public domain" applications. Wallis' "public domain" application ultimately prevailed, and in December, 1958, he was issued a "public domain" lease pursuant to the 1920 Act, being Lease No. B.L.M. 042017 of the Department of Interior (R. 57).

Despite the fact that the written agreements only related to the "acquired lands" applications, nevertheless separate suits were instituted by McKenna and Pan Am seeking to impress such written agreements upon Wallis' "public domain" lease.[4]

The claim sustained below is that all issues should be decided under "applicable principles of Federal law."[5]

---

[4] McKenna asserted that he and Wallis were engaged in a "joint venture" to obtain leases. He joined Pan Am as a co-defendant with Wallis, because of the execution of the option agreement (R. 40) with Pan Am.

[5] While the issue was not raised, nevertheless Trial Judge J. Skelly Wright considered the possibility of the applicability of Federal law but concluded the case should be decided in accordance with local law and ruled in favor of Wallis in both suits. On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law. On original hearing, the majority of the Court ruled (Judge Wisdom dissenting) that the parties' rights should be determined in accordance with Federal law and ordered a remand for trial in accordance therewith (R. 78, 86). Primary reliance was placed upon decisions of this Court dealing with disposal of Federal lands under the Public Land Laws, particularly the case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558 (1858). In denying petitions for rehearing, further written opinions (Judge Wisdom dissenting) were filed (R. 107), the majority concluding "that our opinion should be more closely tied to" the 1920 Act, and then held that the "policy" underlying the 1920 Act required "uniformity" in its application.

In the context of the foregoing, the questions presented for review are:

1. The extent to which the issues involving these private contracts, are governed by Federal law as opposed to local law, including the issues of (1) the formal validity of the private contracts, (2) the applicability of the Statute of Frauds, (3) the applicability of the parol evidence rule, (4) what constitutes a breach thereof, (5) the substantive and operative effect of the private contracts, and (6) the equitable remedies in the event of a breach of such private contracts? For while the majority acknowledged "the right of action was created by state law," yet it remanded for trial "on **all issues** under the applicable principles of federal law,"[6]

2. The extent to which the Mineral Leasing Act of 1920 requires "uniformity" in the adjudication of all issues relative to these private contracts and precludes the applicability of local law, in light of § 32 thereof (App., *infra*, p. 106), which reads in part, as follows: ". . . Nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States," and

3. What interstitial authority or function is vested in Federal Courts by the Mineral Leasing Act, where Congress by § 32 of the Act (App., *infra*, p. 106) has delegated to the Secretary, authority "to prescribe necessary and proper rules and regulations and **to do any and all things**

[6] All emphasis appearing in this brief has been supplied unless otherwise noted.

necessary to carry out and accomplish the purposes of" the Act?[7]

E. STATEMENT OF CASE.

For several years prior to 1954, Wallis was individually engaged in the oil business at New Orleans, Louisiana, and he set out to obtain leases on Federal lands in Plaquemines Parish, Louisiana. At the time, McKenna was working on another matter for Wallis before the Department of Interior (admitted by McKenna to be in the capacity of Wallis' agent), and Wallis instructed McKenna to check the records of the Bureau of Land Management (hereafter referred to as "B.L.M.") as to a number of tracts, to see if they were "open" for leasing. During this search, Wallis decided to concentrate on one particular tract which seemed to be "open," and set about preparing five "acquired lands" applications for leases pursuant to the 1947 Act.

In March of 1954, when the five applications were ready for filing, Wallis called McKenna and reached an oral understanding with McKenna concerning the applications and leases which might issue to Wallis "under" the said applications, with McKenna to have an interest therein. This understanding "was finally reduced to writing in a letter (R. 8) from Wallis dated December 27, 1954,

---

[7] The more important subsidiary questions comprised in these questions for review are: (1) whether or not the owner of a Federal oil and gas lease has "rights" which constitute "property" and are thus subject to local law in accordance with past decisions of this Court and the Circuit Courts, including the Fifth Circuit? and (2) whether or not past decisions of this Court interpreting the Public Land Laws, generally, are applicable to the interest owned by a lessee under a Federal oil and gas lease?

approved by McKenna on January 3, 1955."[8] Simultaneously with the execution of this letter agreement, McKenna executed five powers of attorney agreeing to act as Wallis' **agent** in connection with the five applications and these were filed with the B.L.M. In connection with this agreement with McKenna, McKenna testified that he had agreed to handle all matters in Washington, D. C., with the Department of the Interior and whatever agency might be involved. He further testified that it was contemplated that he would do anything necessary. In fact McKenna was not an attorney-at-law and was not even qualified to practice before the Department of Interior, for in 1952 McKenna had specifically been denied this right, all of which was unknown to Wallis.

One Henry S. Morgan had filed "acquired lands" applications for leases, **prior** to the filing of Wallis' applications, purporting to describe the same property, and it was necessary for Wallis to initiate a contest in the Department of Interior with Morgan, by filing a "protest" as respects Morgan's "acquired lands" applications. Although McKenna had agreed to handle all matters with the Department of Interior, he could not practice there, and so he resorted to the device of prevailing upon Wallis to employ Mastin White to handle the "protest," on the representation that White was an "expert" and a "protest" was a very highly technical matter—with Wallis and McKenna to share in paying White's fee for such services. Without Wallis' knowledge or consent, McKenna told White the protest need be only "*pro forma.*" The "protest" was filed by White in January of 1955, initiating the contest with Morgan.

---

[8] District Court opinion, R. 66.

In February of 1955, Wallis began to have discussions with A. D. Campbell, an employee of Pan Am, about the possibility of Pan Am's acquiring an option upon leases which might issue to Wallis, pursuant to his "acquired lands" applications. They arrived at the terms of an agreement, which were communicated to Percy Sandel, Pan Am's house counsel, with instructions to prepare an agreement, which he did, and it was executed on March 3, 1955 (R. 40). During the confection of this transaction, Pan Am, through Sandel, had Mr. Neil Stull, its Washington, D. C., attorney and expert on B.L.M. matters, check the transaction (including Wallis' contest with Morgan) at the B.L.M.

Shortly after the execution of the Pan Am option agreement, Wallis' "protest" of Morgan's applications was denied, and Wallis appealed, within the Department, to the Director, before whom the matter was briefed and submitted. Unbeknown to Wallis, Pan Am's expert, Mr. Neil Stull, collaborated with Mr. White on the brief submitted to the Director. As respects his participation, Mr. Stull advised his client, Pan Am, that although Wallis was represented by Mr. White, yet he had had a number of conferences with White relative to the case and that White had permitted him to participate in the handling of the case and had included several suggestions made by Stull in the brief filed with the Director in support of Wallis' protest. Further, that he had reviewed White's brief very carefully and did not believe that it could be improved upon and that it met with his complete approval since he could not raise any points which had not been raised by White, and, that, accordingly, he could see no reason why Pan Am should intervene in the case. While the matter

was still pending on appeal, Mr. White had to withdraw, and Wallis employed new counsel, Mr. Harry Edelstein, a former Assistant Solicitor of the Department of Interior. Edelstein reviewed the work done by Mr. White in connection with the appeal concerning the "acquired lands" applications, and he agreed with Pan Am's attorney, Mr. Stull, that White's work could not "be improved upon," and testified there was nothing further that he could do, or did, towards prosecuting the pending appeal. However, in reviewing the records in the B.L.M. he noted that Henry S. Morgan, at the time he filed his "acquired lands" applications, had also filed "public domain" lease applications under the 1920 Act, as respects the same lands. Morgan's "public domain" applications had been lying dormant, but Edelstein suggested[9] that Wallis also file a "public domain" application, as a precautionary matter. This was done in March of 1956, and Edelstein filed a "protest" on behalf of Wallis as respects Morgan's "public domain" applications.

In April of 1956, Wallis disassociated himself from McKenna, and advised McKenna that he was terminating his agreement with McKenna, for reasons which need not be elaborated upon.

In June of 1956, the Director, of his own motion and without notice to the parties, consolidated the contest between Wallis and Morgan as respects the "public domain" applications, with their contest over the "acquired lands" applications, thus bypassing the initial administrative level, and he then ruled the lands in question to

[9] We need not burden this account with the dispute as to who discovered the Morgan applications, and, suggested Wallis file a "public domain" application—McKenna or Edelstein. The trial Court did not resolve the dispute.

be "public domain" lands, rejected both Wallis' and Morgan's "acquired lands" applications, and ruled Morgan's "public domain" applications defective, holding Wallis entitled to a "public domain" lease under the 1920 Act. This decision was ultimately sustained by the Secretary of the Interior,[10] and the lease No. B.L.M. 042017 was issued to Wallis in December of 1958 (R. 57).

Despite the fact of the letter agreement (R. 8) between Wallis and McKenna, and, the simultaneously executed powers of attorney where McKenna had agreed to act as Wallis' agent, plus the fact that the letter agreement was restricted to the "acquired lands" applications,[11] McKenna filed suit alleging a joint venture agreement with Wallis, seeking to utilize parol and extrinsic evidence to maintain the joint venture and impose it upon the "public domain" lease held by Wallis.

The jurisdictional predicate for McKenna's suit was diversity of citizenship (R. 1, *et seq.)*, and while McKenna prayed for declaratory relief that he had an undivided one-third interest in the Federal Oil and Gas Lease B.L.M. 042017, issued to Wallis, yet in effect he was asking for specific performance. Wallis (R. 9, 24) interposed as defenses (1) a denial of a joint venture, asserting McKenna was employed as his agent,[12] (2) the local Statute of Frauds, (3) the parol evidence rule, (4) fraud and/or a failure of consideration or lack of contractual

[10] The Secretary's ruling was affiirmed by the Court. *Cf. Morgan v. Udall*, 306 F. (2d) 799, and writ was refused, 371 U. S. 941.

[11] The trial Court said: "Indeed, Wallis' letter to McKenna which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest." R. 72, footnote 18.

[12] The trial Court did not deem it necessary to decide this issue. R. 67, footnote 4.

capacity, all based upon McKenna's agreement to handle all matters with the Department of Interior where it was contemplated that McKenna would do anything necessary, whereas McKenna could not and did not render such services, since he was not admitted to practice before the Department.[13]

Despite the fact that the option agreement with Pan Am (R. 40) was restricted to the "acquired lands" applications and leases which might issue to Wallis "under and by virtue of" **these applications,** Pan Am brought suit for specific performance of the option agreement (R. 32), seeking to impose it upon Wallis' "public domain" lease, the jurisdictional predicate for its suit being diversity of citizenship. In attempting to maintain its claim, Pan Am (1) placed emphasis upon Paragraph II of the option agreement (R. 40) and its provision concerning "diligent efforts,"[14] (2) relied upon an alleged contemporaneous conversation between Wallis and Pan Am's house counsel, Sandel, at the time of the signing of the option agreement, supposedly concerning Morgan's "public domain" applica-

---

[13] The trial Court did not deem it necessary to decide this issue. R. 74, footnote 24.

[14] The trial Court said: "Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. (footnote) . . . Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely 'the things concerning which * * * the parties intended to contract.' . . . R. 72.

tions,[15] and (3) urged some type of estoppel based upon the "diligent efforts" provision of the option agreement coupled with the assertion that Wallis did not take a definitive position before the Department as to the character of the land.[16]

Wallis defended (R. 45, 50) by (1) denying that the option agreement covered his "public domain" lease, (2) asserting the local Statute of Frauds, and the parol evidence rule, (3) urging that Pan Am had not elected to exercise the option agreement in writing, as required by the Statute of Frauds, (4) asserting the option agreement was not binding, because (a) the consideration or "price" for a conveyance to Pan Am was "uncertain" since it could be altered at Wallis' option and (b) Wallis could elect to reserve an "oil payment" out of production, and there would, therefore, be no "consideration" since Wallis would be simply purporting to "reserve" what he had, and (5)

---

[15] The trial Court refused to believe Sandel, and held no such conversation took place, saying "Though Campbell, the Pan American agent who negotiated the option 'deal' with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, inter alia, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, *including Sandel's own correspondence*, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected . . ." R. 72, footnote 18.

[16] In light of the statement of its own attorney and expert, Mr. Stull, to the effect that he had participated in the prosecution of Wallis' "acquired lands" application, and appeal thereon, and did not believe it could be improved upon, Pan Am was never able to show where Wallis failed to make "diligent efforts."

interposing two defenses based upon the Mineral Leasing Act, and the regulations issued thereunder.[17]

District Judge J. Skelly Wright ruled in favor of Wallis in both cases, holding the written contracts, in each instance, were restricted solely to the "acquired lands" applications and did not encompass the "public domain" lease. Moreover, Judge Wright heard **all** parol and extrinsic evidence, and held that it merely confirmed the written agreements that the parties had only intended to contract with reference to the "acquired lands" applications;[18] but Judge Wright ultimately rejected all parol and extrinsic evidence, under the parol evidence rule and the local Statute of Frauds. Despite the fact that the case was tried, argued and submitted by Pan Am and McKenna, based upon the applicability of local law, yet Judge Wright considered the question of the applicability of Federal law, but concluded that local law was controlling.

On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law, and the Court of Appeals reversed (R. 78) Judge Wright, by a divided vote, and "remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Circuit Judge Wisdom filed a written dissent (R.

---

[17] Defenses (3) through (5) were not passed upon by the District Court. R. 74, footnote 24.

[18] Said the trial Judge: ". . . The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan American to the acquired lands applications." R. 72.

86) agreeing with Judge Wright.[19] In denying petitions for rehearing, the majority handed down a further written opinion (R. 107) with Judge Wisdom filing a further written dissent (R. 114).

The majority opinion, on rehearing, represented a decided shift in the predicate upon which its original opinion rested, if not a repudiation thereof. The original opinion was founded, in the main, upon decisions by this Court relating to the disposal of **land** under the Public Land Laws, with particular emphasis placed upon the case of *Irvine v. Marshall*, *supra*. It made only a passing reference to two sections of the 1920 Leasing Act, coupled with the observation that the Act "makes it clear that, as part of the public policy . . . directed at opposing monopoly . . . the Bureau of Land Management must examine the qualifications of the real lessee and of any assignee of a mineral lease . . . Those provisions leave no room for operation of any State law."

On rehearing, when confronted with numerous other decisions by this Court dealing with the Public Land Laws, which destroyed the predicate for the original opinion, the majority "concluded that our decision should be more closely tied to that [1920 Leasing] Act," although it did not expressly repudiate the prior reliance upon the *Irvine* case, *supra*, and the other decisions initially relied upon.

---

[19] In view of the importance of the question involved concerning Federal-State relationship, it is noteworthy that, below, each disposition of the basic question won the vote of one circuit Judge and one district Judge.

This Court granted certiorari (R. 134), inviting the Solicitor General to file a brief expressing the views of the United States.

F. SUMMARY OF ARGUMENT.

This private dispute over the ownership of a Federal oil and gas lease does not involve the United States, since the lease duly issued to Wallis. While the United States has no interest in the outcome of this case, yet due to the large number of outstanding Federal leases, as noted in *Boesche v. Udall*, 1962, 373 U. S. 472, 484, the decision in this case will be of major importance. For if the decision below is allowed to stand, it is bound to adversely affect the title of private parties to many such leases which have heretofore been transferred by the original lessees.[20]

I.

The threshold argument, of necessity, is the fact that where a possible Federal-State conflict is suggested, as to the law applicable to a private transaction, it is the intent of Congress that determines the applicable law. This Congress has done in favor of local law, by the "proviso" of § 32 (App., *infra*, p. 106) of the Mineral Leasing Act, to the effect that: "Nothing in this Act shall be construed or held to affect the rights of the

[20] The original majority opinion below rested almost entirely upon an erroneous application of decisions by this Court dealing with the Public Land Laws, generally. When this error was pointed out on rehearing, the majority did not expressly repudiate the first opinion, but shifted emphasis to the Mineral Leasing Act and its "policy" against "monopolies." In doing so, it relied, in the main, upon an erroneous interpretation of this Court's decision in the *Boesche* case, *supra*. Because of the foregoing, the argument presented herein is required to deal with both such opinions.

States . . . to exercise any rights which they may have . . ." Section 32 is more than a sufficient *indicia* that Congress intended local law should control. The majority below acknowledged (R. 113) that the transaction here involved well might "constitute transactions essentially of local concern." But aside from this proviso, the decisions of this Court dealing generally with this question, establish the guideline to be followed in the resolution of such a suggested conflict, **as the observance of a fair accommodation between State and Federal authority, if a reasonable opportunity is afforded the protection of the Federal interest.** Such cases show that this is not a case requiring the applicability of Federal law, although such cases serve to "point up" and emphasize the controlling effect of the proviso of § 32.

II.

One who holds a validly issued Federal oil and gas lease, has a "right" or "interest" which is "property" in the fullest sense of the word, particularly as respects private parties, and local law governs and controls **private transactions or contracts** had in connection therewith, all so long as there is no contrary Federal statutory provision, or, regulation issued by the Secretary of the Interior, which intrudes upon the matter. This is particularly true where Congress has provided, as in this case, for the protection and safeguard of any possible Federal interest. This has been the consistent administrative policy of the Secretary, and the decisions of the Courts interpreting the Act are in accord. The *Boesche* case, *supra*, does not warrant a contrary conclusion.

III.

The Mineral Leasing Act is but an evolvement, or outgrowth, of the Public Land Laws, generally, and even if the *Boesche* case, *supra*, is subject to an interpretation or construction, that in the case of a Federal Oil and gas lease, and, because the United States has not parted with "title" to the land, the lessee does not have a "property" right in the fullest sense of the word, nevertheless under the decisions relating to such Public Land Laws and **as respects third persons and private transactions with them**, the Federal lessee (1) has "rights," which constitute "property," and are thus subject to local law, so long as local law is consistent with (a) the fact that "legal" title to the land is vested in the United States, and, (b) the Acts of Congress relative thereto; (2) such "rights" constitute "property" in the same sense that other inceptive "rights" acquired by individuals pursuant to the Public Land Laws, generally, constitute "property," even though the legal title is vested in the United States; and (3) the decisions and jurisprudence relating to inceptive "rights" acquired pursuant to the Public Land Laws, generally, are equally applicable to such "rights" acquired pursuant to the Leasing Act. In interpreting the Leasing Act, the Land Department, a decision of this Court, and, numerous decisions by the Courts of Appeal (including the Fifth Circuit), have cited and followed decisions arising under the Public Land Laws, generally, and have applied the principles established thereby.

IV.

The cases dealing with the Public Land Laws, generally, with respect to those who have inceptive "rights" in public land pursuant thereto, hold that even though

the "legal" title to the land is vested in the United States, nevertheless, **as respects all but the United States,** the holder of such rights (1) may treat the land as his own, and (2) is the lawful possessor of the land, clothed with an inceptive title, and the policy of Congress has been to leave the protection of such rights to local law, relegating him to availing himself of the same rights that are open to others holding lands, by title absolute or inchoate. Clearly, those who hold validly issued Federal leases, **do not enjoy a lesser status or less rights,** and this policy of Congress which inheres in the Public Land Laws, generally, is also applicable to the Leasing Act.

V.

The cases interpreting the Public Land Laws, generally, clearly delineate the extent of the jurisdiction of Federal Courts, in both actions at law and in equity, to apply Federal law as respects those who have acquired lands from the United States. Such cases hold that in order for an individual to impose an "equitable trust" upon a legal title issued by the Government, he must (1) predicate his claim upon (or derive it from) dealings with the Land Department, and (2) show that under **Federal law** the Land Department should have awarded the legal title to him, instead of the other. In the absence of such a showing, and particularly in this case where these respondents had no dealings with the Land Department, but their claims are **through Wallis,**[21] there is no jurisdiction to apply Federal law. This Court has applied these cases and the principle enunciated, to one holding a Federal lease, and the decisions of the Courts of Appeal are to the same effect.

[21] This was acknowledged by the majority below (R. 108).

VI.

Since the inception of the Leasing Act over forty years ago, the Courts of Appeal (including the Fifth Circuit) have consistently held (including a decision rendered while this case was pending on rehearing) that one who has acquired a lease under the Leasing Act **(as respects third persons and private transactions)** is in a position entirely analogous to one who holds a Federal patent to land. Many of these same cases have squarely held that local law is applicable to private transactions relating thereto. We submit that a decision of this Court embodies these same principles, and, this has been the policy of the Land Department.

The decision below, being the single instance of a conflict in the jurisprudence and coming at this late date (approximately 45 years), if allowed to stand, would necessarily "cloud" many titles to Federal leases heretofore issued and subsequently transferred. Particularly is this true when consideration is given to the fact that decisions of the Ninth and Tenth Circuit (where the bulk of the Federal lands are situated) have most clearly and consistently announced the principles so set forth. Additionally, and as respects future dealings with such leases, it casts them into the vacuum of a vague and, as yet, wholly undefined system of a "Federal law of titles."[22] Due regard for a policy directed at the stability of titles, denies affirmance of the decision below.

---

[22] In the words of Judge Wisdom, ". . . if a federal court, in the name of interstitial lawmaking, may concoct a Law of Property, Law of Contracts, Law of Restitution, and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee a fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states."

VII.

There is no "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands" is properly vested, where such "equitable title" **is not** derived from dealings had with the Land Department, for Congress alone has exclusive authority to determine how and in what manner public lands, or rights thereto, are disposed of. Congress has designated the Secretary of the Interior and the Land Department as the vehicle for such disposal. Having, by § 32 (App., *infra* p. 106) of the Leasing Act, delegated authority to the Secretary to "prescribe . . . regulations . . . and to do any and all things necessary to carry out and accomplish the purpose" of the Act, to the extent the Act vests interstitial authority, it is vested in the Secretary, not the Courts.

VIII.

The decision below (in the words of dissenting Judge Wisdom) finds merely the "presence of a federal statute," plus a "policy" furthered by the statute, and then simply **concludes** that "uniformity" is **required** as respects the adjudication of all private disputes. At no place does the opinion demonstrate how, or why, the adjudication of such private transactions **in accordance with local law** in any way relates to, or has any connection with, the "policy" of the Act, or would affect the interests of the United States. Nor does it show or demonstrate how, or why, **uniform adjudication** of such private rights would relate to, or have any connection with, the "policy" of the Act, or the interests of the United States. This conclusion is contrary to the action of the Secretary in administering the Act.

IX.

The conclusion by the majority below, that: "It is clear that the . . . Act recognizes the devices of 'assignments' and 'options' as concomitants of the" policy of the Act, is totally without foundation. To the extent that these devices have any relationship to the policy of the Act, Congress, by the very terms and provisions of the Act, has provided the necessary safeguards. This conclusion is contrary to the administrative interpretation of the Secretary, and, is contrary to the decisions of the Courts of Appeal (including the Fifth Circuit), for they have attached no significance thereto.

This conclusion with respect to "assignments," is further contrary to the legislative history of the Act, particularly the 1946 amendment thereto which incorporated § 30 (a) (App., *infra*, p. 104) into the Act. As respects "options" the conclusion is unsound, when consideration is given to the situation which prevailed, and, the administrative practice in connection therewith, all of which brought about and gave rise to the 1946 amendment and statutory recognition of "options," and, the statutory regulation and requirements in connection therewith.

G. ARGUMENT.

I. The Decision Of The Majority Below Is Contrary To The Secretary's Administrative Interpretation And Application Of The Leasing Act.

In granting certiorari this Court invited the Solicitor General to file a brief expressing the views of the United States. Accordingly, at the outset, we shall devote some attention to the administrative interpretation and application of the Leasing Act by the Secretary of the In-

terior, particularly in light of the fact that the decision below is contrary thereto.

In the administration of the Leasing Act, it has been the Land Department's interpretation thereof, that the granting of a Federal oil and gas lease vests the lessee with a property right and estate for years in real property, that the holder of such a lease has an immediate leasehold interest in the land,—in short, a lease conveys an interest in the land. In an opinion by the Solicitor of the Department of the Interior, dated January 12, 1945, and addressed to the Assistant Secretary of Interior, 59 I. D. 4, this statement appears at page 6:

> ". . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and **vested the lessees with a property right and estate for years in real property. The rule adopted was said to be 'consistent with the purpose and intent of the leasing law.'** "

and at page 10:

> ". . . On the other hand, a holder of a non-competitive lease has **an immediate leasehold interest** in all of the lands subject to the lease for 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . ."

In accordance therewith, in the decision of *John L. McMillan*, (A-26365, 1952) 61 I. D. 16, this statement appears

at page 18: "In the first place, an oil and gas lease under Section 17 of the Mineral Leasing Act conveys an interest in land . . ." And as recently as September 30, 1958, in an unreported decision by the Director of the Department, approved October 8, 1958 by the Assistant Secretary of the Interior, *American Metal Climax, Inc.* (Colorado 0318, etc.), the following statement appears:

> "This argument overlooks the fact that **an oil and gas lease conveys an interest in land.** *John L. McMillan*, 61 I. D. 16 (1952). An **assignment** also **is such a conveyance. A valid conveyance** of an interest in land **can be made only** in the manner prescribed **by the law of the place where such land is situated.** *Munday v. Wisconsin Trust Company et al.*, 252 U. S. 499 (1920). Hence an interest in land can be transferred by operation of law **only by the law of the State where the land is.** Section 223, Restatement of the Law of Conflict of Laws. A merger of corporations outside of the State of Colorado cannot affect the ownership of interests in land within the State, **unless the laws of Colorado are complied with."**[23]

This then has been the administrative interpretation of the Act, and such interpretation concludes that the federal lease (1) "conveys an interest in land," and (2) transfers thereof can only be made in accordance with the law of the *situs* of the land—local law. This second conclusion necessarily follows from the first, in accordance with this Court's decision in *Wilcox v. McConnel*, 1839, 38 U. S. 498, 516, *to-wit:*

---

[23] For the convenience of the Court, a copy of this decision is being filed with the Clerk of this Court.

"... but that whenever, according to those (United States) laws, the title shall have passed, **then that property, like all other property in the state, is subject to the state legislation ...**"

Against the background of the foregoing interpretation of the Act by the Land Department, and consistent therewith, where disputes have arisen between private parties as to whether or not a private transaction operates to transfer a Federal lease, and such dispute has been presented to the Land Department, it has declined to resolve the dispute, referring the parties to the Courts. Thus in *Hill v. Liddell*, 59 I. D. 370 (1947), as respects a dispute arising out of *a private contract with a lease owner*, this statement is made, page 375:

"... Moreover, the dispute between Hawkins on the one side and Liddell and N. S. Williams on the other side, each charging the other party with having breached the terms of their agreement of August 21, 1944, is a matter which could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department ..."

Richfield Oil Corporation (A-27603, 1958), 65 I. D. 348, involved a dispute over the interpretation of a contract, one party asserting that it operated as "assignments" of the Federal oil and gas leases and the other asserting that it operated as "subleases in the nature of operating agreements," and the opinion states, at page 354:

"... Obviously, the parties disagree as to the nature of the instruments. In like circumstances **it has**

been the traditional position of the Department that matters of private contract dispute are for the parties and the courts, not the Department, to decide. See *John H. Corridon*, A-27390 (February 18, 1957) and cases cited therein."

The foregoing has been the administrative interpretation of the Leasing Act,[24] and we shall hereafter demonstrate, that the Court decisions have been in accordance therewith. Moreover, Congress has amended the Leasing Act more than a dozen times in forty years, as it relates to oil and gas leases,[25] and, in the course thereof, Congress gave specific attention to § 30, dealing with "assignments" of leases, when in 1946 it added § 30 (a) to the Act. Congress is bound to have been aware of this administrative interpretation of the Act, and the Court decisions consistent therewith, and, yet, it has taken no steps to change or alter them. In fact, as we demonstrate here-

---

[24] In *McLaren v. Fleischer*, 256 U. S. 477, 480-481, it was held: "In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of, and except for a departure soon reconsidered and corrected, they have adhered to it and followed it ever since. Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."

[25] See Act of April 30, 1926, 44 Stat. 373; Act of July 3, 1930, 46 Stat. 1007; Act of March 4, 1931, 46 Stat. 1523; Act of Aug. 21, 1935, 49 Stat. 674; Act of Aug. 26, 1937, 50 Stat. 842; Act of Aug. 8, 1946, 60 Stat. 950; Act of June 1, 1948, 62 Stat. 285; Act of Sept. 1, 1949, 63 Stat. 682; Act of July 29, 1954, 68 Stat. 583; Act of Aug. 2, 1954, 68 Stat. 648; Act of Sept. 21, 1959, 73 Stat. 571; Act of Sept. 2, 1960, 74 Stat. 781.

after, the 1946 amendment, which added § 30 (a) to the Act, fortifies this interpretation and is entirely in keeping therewith. In light of these considerations, it cannot be denied that many outstanding titles are based upon the foregoing administrative and Court interpretations of the Act. We submit that the decision below is contrary to the foregoing, and a proper regard for stability of titles requires its reversal.

In conclusion, we will state that even if the Court should conclude that the administrative interpretation of the Act is in error, as respects the nature of the interest granted by a Federal oil and gas lease, nevertheless the other administrative interpretation and application of the Act, as respects disputes between private individuals, is still proper and correct, as we shall demonstrate hereafter.

II. The Comprehensiveness Of The Mineral Leasing Act, And, The Alleged Need For Uniformity—As Opposed To The Proviso Of Section 32 Of The Act Reserving The Right To The States "To Exercise Any Rights" Which They May Have.

We baldly assert that the second opinion of the majority below, holding there is a need for "uniformity" in the law applicable to these private transactions, is rendered entirely in error because of the express Congressional prohibition found in § 32 of the Leasing Act (App., *infra*, p. 106), that "**nothing** in this Act shall be **construed or held** to affect the rights of the States . . . to exercise any rights which they may have . . ." The second opinion holds that the Leasing Act "represents a comprehensive

scheme of federal regulation" and that this required the conclusion that "the interest of the United States is directly affected" by the law applicable to these private agreements. Said the majority, "uniformity" in the law applicable is required and there is no room for the applicability of local law. Yet the majority opinion does not point out wherein the applicability of local law would or might conflict with any express statutory provision, or regulation issued pursuant thereto by the Secretary of the Interior. The decision is pitched solely upon the requirement of "uniformity" which, in some obscure fashion, it relates to the "policy" of the Act. This conclusion is contrary to the administrative interpretation of the Act by the Secretary.

The second opinion only referred to that portion of § 32 of the Act which grants the Secretary authority to administer the Act, and, prescribe rules and regulations to accomplish the purposes of the Act. The second opinion gives absolutely no consideration to the further proviso of § 32, above noted, and, we submit, that this provision was entirely overlooked. We further submit that this provision entirely precludes the conclusion of the second opinion.

It will be noted that this proviso is drawn in the broadest terms for it precludes not only "construction" of the Act, but in addition prohibits any **provision of the Act** from denying the rights of the States "to exercise any rights which they may have." This broad grant includes the further proviso as respects the rights of the States, as "including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." The all-encompassing language of the entire proviso has never been

interpreted by this Court. However, it has had occasion to interpret the above quoted "included" authority to tax, in the case of *Mid-Northern Company v. Walker*, 268 U. S. 45 (1924). In that case an effort was made to restrict, by interpretation, the all inclusiveness of the "included" right to tax. However, this Court rejected such effort to limit and circumscribe the proviso, saying, p. 49: ". . . In other words, **the purpose of Congress** was to remove **altogether** from the field of controversy, **among other questions,** the very question which is here presented, and to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property, . . ., **without regard** to the origin thereof or **to the interest of the United States in the lands or leases.**"

In connection with this extract, we wish to emphasize the fact that it interprets this proviso as respects a mineral lessee, as subordinating the "interest of the United States in the lands or leases" to the exercise of local right and authority. The opinion concludes with this statement (p. 50): ". . . We think the proviso **plainly discloses the intention of Congress** that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." While in keeping with the questions there presented, this last statement by the Court is restricted to "any form of state taxation," if we substitute for this restriction, the all-encompassing language of the whole proviso, it would read that persons and corporations holding leases under the Act "should not, for that reason, be exempt from any form of the exercise of any rights or authority of the States otherwise lawful."

What are the "rights of the States," the exercise of which, the Act shall not "be construed or held to affect . . ."?[26] We need look no further than the second opinion when it says: ". . . federal law did not create the right of action . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment' —whether they be oral or arise by operation of trust—implies that we should look to the law of the state. * * * While it might be said that [these claims] constitute transactions **essentially** of local concern and that the resulting litigation is 'purely between private parties,' . . . * * * We do not think the use of these devices as a part of the scheme of carrying forth this public policy **should be limited by interstitial restrictions imposed by the law of the State of Louisiana . . .**"

In addition to the foregoing, the second opinion says, "the action is not one under federal law in the sense that federal law did not create the cause of action," and when this is coupled with the further statement, "federal law did not create the right of action," it necessarily acknowledges that such was created under local law. Being a State-created cause of action, is not one of the "rights of the State," the right to have that cause of action and all issues, including the remedy, governed and controlled by State

[26] Consider this proviso of Section 32 in light of what was said in *Davies Warehouse Co. v. Bowles*, 321 U. S. 144, 155 (1943): "It is a much more serious thing to adopt a rule of construction, as we are asked to do here, *which precludes the execution of state laws by state authority in a matter normally within state power.* The great body of law in this country which controls acquisition, transmission, and *transfer of property, and defines the rights of its owners in relation . . . to private parties,* is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified . . ."

law?[27] We need not pause to consider the incongruity of the acknowledgment in the second opinion that the right and cause of action were State-created, with its decision that the case be remanded for trial "on **all** issues under the applicable principles of federal law." *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1945), which the second opinion cites and relies upon, did not pretend that Federal law governed **all** issues in the case. A mere reading of the *Francis* case discloses that in that case recovery might have been had under local law but for Federal law, and it illustrates a situation where the "rights of the State(s)" would have precluded the applicability of Federal law, had the statute there in question contained a proviso similar to that in § 32 of the Leasing Act.

We submit that the proviso of § 32 unqualifiedly precludes the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest" as respects the Leasing Act, and contrary to the holding of the second opinion in this respect.[28]

---

[27] The State has not ceded jurisdiction over the lands in question, nor was jurisdiction reserved when the State was admitted to the Union (Cf., Act of Feb. 20, 1811, and, Act of April 8, 1912), and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution (*Supra*, p. 3), and, this Court's decisions in *Wilson v. Cook*, 327 U. S. 474 (1945), and *Paul v. U. S.*, 371 U. S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied.

[28] In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. A., 2nd, 1962), the Court said: "Persons dealing in land within a state must conduct themselves in the light of the state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in [a] rather rare event . . ."

Without regard to this provision of § 32 of the Act, and based solely upon the decisions of this Court which deal generally with the question of what law controls,—Federal or State, such cases disclose that this is not a case which requires the applicability of Federal law. Yet, when these cases are considered in light of this provision of § 32, they serve to emphasize the glaring error which is inherent in the decision below.

Any consideration of these cases should commence with *Radio Station WOW v. Johnson*, 326 U. S. 120, (1944), where this Court held that a judgment under local law impinged upon the prerogatives of the Federal Communications Commission, by attempting to control the conduct of parties before that Commission, but said, p. 132: "On the other hand, if the State's power over fraud can be effectively respected while at the same time **reasonable opportunity** is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, **should be observed.**" Nowhere does the second opinion demonstrate that a "reasonable opportunity is **(NOT)** afforded for the protection of (the) public interest," as respects the Leasing Act, because of the applicability by the Trial Court of "the State's power over fraud" as it is epitomized by the local Statute of Frauds.

Farmers Union v. WDAY, 360 U. S. 525 (1958), states, p. 535: ". . . But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Here, petitioner is asking us to attribute to § 315 a meaning which would

either frustrate the underlying purposes for which it was enacted or alternatively impose unreasonable burdens on the parties governed by that legislation. **In the absence of clear expression by Congress we will not assume that it desired such a result . . .**" This extract calls for a "clear expression by Congress," [29] and we submit that § 32 of the Act **is such a** "clear expression by Congress."[30] We, of course, do not concede that the applicability of local law to these private transactions would either frustrate the

---

[29] In *Paul v. U. S.*, 371 U. S. 245 (1963), this Court said, at page. 250: "If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, we can only believe that the objectives of the Act would have been differently stated . . ."

[30] As to what constitutes a "clear expression by Congress," we direct the Court's attention to the recent holding by the Fifth Circuit, in an opinion *authored by the same Judge* as the two opinions below, and rendered while these cases *were pending on rehearing*. We refer to *The Leiter Minerals, Inc. v. U. S.*, 329 F. 2d 85 (1964), which involved a contract *whereby the United States purchased land*, said the Court, p. 89: "In addition, section 715f of the Migratory Act reads: 'No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title *unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.*' (Emphasis by the Court.) We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. *State law must govern in the absence of a federal statute making federal law applicable . . .*" This case was compromised while pending on application for writ of certiorari, and pursuant to motion of the parties the writ was granted, an order entered vacating the decision of the Fifth Circuit, and the case was remanded with directions to dismiss the suit. *U. S. v. The Leiter Minerals, Inc.*, 381 U. S. 413. In view of this disposition, we recognize that the decision of Leiter has no efficacy as a judicial precedent. We allude to the decision herein simply because it illustrates the fact that the organ of the court below was entirely aware of the proper basic principle that should have been applied to this case.

purpose of the Leasing Act, or, impose unreasonable burdens on the parties governed thereby, and nowhere does the second opinion so demonstrate.

Similarly, in *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, this statement appears at p. 176: "It is familiar doctrine that the **prohibition** of a **federal statute** may not be **set at naught,** or **its benefits denied,** by state statute or state common law rules. **In such a case** our doctrine is not controlled by *Erie R. Co. v. Tompkins* . . ." The majority below did not point out any "prohibition of a federal statute . . . set at naught, or its benefits denied," by the decision of the Trial Court. On the other hand, this extract demonstrates why § 32 of the Leasing Act is applicable to the case at bar, when considered in light of the facts involved in *Sola*. It shows that where the cause and right of action asserted are created by local law based upon contract, then under local law the defense of estoppel is a good defense, **but for** "the prohibition of a federal statute." In the case here involved the majority reversed because of the Leasing Act—some unspecified requirement of the "policy" of the Act. Yet the Leasing Act (§ 32) provides that "nothing in this Act shall be construed or held to affect the rights of the States . . . to exercise any rights which they may have . . ." We submit that a "right" of a State is to have its "public policy" as evidenced by its laws, applicable to, and dispositive of, a State-created cause and right of action. *Sola* acknowledges that such would be the case, **but for** the "prohibition" of a federal statute, yet § 32 of the Act says that Act shall not be held or so construed to operate.

The majority opinion cited no authority in support of its conclusion that "uniformity" is required as respects

the applicability of local law to these private transactions, but **only suggested** that its conclusion be **compared** with the decision in *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U. S. 29 (1956).[31] The holding in that case that Federal Law was **not applicable** to the private transaction there involved, was summarized by this Court as follows: ". . . because the litigation between the two private parties there did not intrude upon the rights and the duties of the United States, the effect on the only possible interest of the United States—the floating of securities —being too speculative to justify the application of a federal rule. That doctrine clearly does not apply when the State fails to give effect to a term or condition under which a federal bond is issued, as the Court there noted . . ."[32] Nowhere does the second opinion point out wherein the applicability of local law to these private transactions has failed to "give effect to a term or condition" under which this federal lease was granted, nor to give effect to any provision of the Leasing Act or any regulation issued thereunder. For in the final analysis, local law as here applied, was entirely negative, in that it simply said that as a result of this private transaction, the status of this federal lease **was in no way altered.** The majority opinion did not pretend that local law as here applied, would affect the "floating" of Federal leases. The Secretary does not consider that the applicability of local law to private transactions involving transfers of Federal leases in any way affects the interests of the United States, nor does he con-

---

[31] In the recent case of *Bolack v. Underwood*, 340 F. 2d 816 (C. C. A 10th, 1965), in a dispute between private individuals over the ownership of a Federal lease, the Court specifically cited *Bank of America* in support of the holding, that "no right of the federal government is involved, state law governs."

[32] *Free v. Bland*, 369 U. S. 663, 669 (1961).

sider uniformity in the law applicable to such transactions necessary, *supra*, pp. ~~30~~ 32, *et seq.* *Bank of America*, as it relates to the question of Federal Courts developing or creating "federal common law," was placed in proper focus by the recent decision of this Court in *Wheeldin v. Wheeler*, 373 U. S. 647 (1962), when this Court said, at page 651:

> ". . . As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co. v. Tompkins*, 304 U. S. 64. **The instances where we have created federal common law are few and restricted.** In *Clearfield Trust Co. v. United States*, 318 U. S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. *Id., p. 367.* ***But even that rule was qualified in Bank of America v. Parnell*, 352 U. S. 29 . . .***"

In *San Diego Unions v. Garmon*, 359 U. S. 236 (1959), at page 241, this Court said: "In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration . . ." The majority opinion below, in disregard of, and contrary to, past decisions of this Court and those of the Circuit Courts, including the Fifth Circuit, makes absolutely no effort to differentiate among "conflicting rules of law, of remedy, and of administration." No effort is made at "delimiting areas of potential conflict," or consideration given to matters of "a merely peripheral concern." On the contrary, in one fell swoop, it wipes the slate clean **of any area** for the

exercise of local law, by requiring the application of Federal law to **all issues.**

As we view the opinions below, the Court's acknowledgment that the right and cause of action here involved are locally created, thereby removes these cases from the "full sweep" of the doctrine of *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1956). Yet without so stating, it attempts to take advantage thereof, by speaking of the comprehensiveness of the Leasing Act. But this disregards several important factors. The Leasing Act, to the point of granting leases on Federal lands, is no different and no more "comprehensive" than any of the other general Public Land Laws. The only real difference results simply from the nature of the "right" granted, and, more particularly, the situation contemplated **after the "right"** in the Federal land **is granted.** This results from the fact that a lease is a continuing executory contract, which continuously generates rights in favor of the lessor, the United States. Thus when this Court noted, in the *Boesche* case, that the Leasing Act "has also subjected the lease to exacting restrictions and continuing supervision by the Secretary," it was speaking in the main **of the supervision** of the lessor's rights under the lease, and, of the operations conducted under the lease in accordance with the terms of the lease, all as distinguished from the **ownership of the lease itself.** On this aspect of the matter, the ownership of the lease, there is nothing "restrictive," for while an "assignment" or "sublease" must be approved by the Secretary, yet he has no discernible discretion, since under § 30 (a) (App., *infra*, p. 103), he may "disapprove" **for only two specific reasons.** This, we submit, should be contrasted with what was said in the *San Diego Union* case, *supra*, concern-

ing the labor laws, and more particularly the administration thereof by a "centralized administrative agency."[33]

The Public Land Laws, generally, have always provided for administration thereof, by the Secretary of the Interior. No special "administrative agency" is created by the Leasing Act. Yet all of the other Public Land Laws are similarly administered by the Secretary and the "policy" of Congress has been to leave to local law and local tribunals, the adjudication of **"private transactions"** had by those holding inceptive "rights" under such laws. As noted, the Secretary has applied this "policy" to the Leasing Act.

The foregoing cases disclose **that where a federal statute** (including existing regulations thereunder and the decisions interpreting it) **intersects the local law, there should be a serious effort to accommodate the state law where there is a conflict between private parties, provided that, in doing so, there is reasonable opportunity afforded the protection of the Federal interest.**

---

[33] Even in the field of labor law, in *Hamilton Foundry & M. Co., v. International M. & F. Wkrs.*, 193 F. 2d 209 (C. C. A. 6th, 1951), certiorari denied 343 U. S. 966, a local Statute of Frauds was applied to a collective bargaining agreement, the Court saying, page 215: "Although the contract and federal jurisdiction to enforce it arise out of a federal statute, *the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought.* We agree with appellant that a state statute can not change or diminish *a substantive right* created by a federal statute, . . . , but a state statute is applicable *where it deals with the remedy rather than with the substantive right . . .*" This decision was cited with approval in *Lincoln Mills*, but the decision in *Lincoln Mills* leaves it unclear as to whether or not this remedy would be "a merely peripheral concern of the Labor Management Relations Act," as referred to in the *San Diego Unions* case.

The majority opinion, in stating that all issues between the private parties now before the Court, should be decided under federal law, made no apparent effort to accommodate the local law and did not explain how the application of the local law might, even to the slightest extent, represent a conflict between federal and local law. But admitting, *arguendo*, that there is some possible conflict, we submit that Congress, by § 32 of the Act, has resolved that conflict in favor of local law.[34]

III. The Original Opinion Of The Majority Below And The *Boesche* Case, In Light Of Decisions Concerning The Public Land Laws, Generally, And The Decisions Interpreting The Mineral Leasing Act.

Without mention of the *Boesche* case, the original opinion (R. 78) of the majority relied entirely upon decisions relating to the Public Land Laws, generally, with only a passing reference to the Leasing Act and its "policy" against "monopoly." **Not one single case was cited** which dealt with the Leasing Act. In its second opinion (R. 107) the majority did not explicitly repudiate the predicate for its original opinion, although, we submit, it did so by inference, for it acknowledged that: "We have concluded that our decision should be more closely tied to that [Leasing] Act." It is apparent that the second decision utilized the *Boesche* case as a vehicle for avoiding the force and effect of decisions relating to the

[34] Added evidence of Congressional solicitude and regard for the full sway of local law is found in Section 30 of the Act, where Congress detailed certain matters which should be covered by provisions to be inserted in Federal leases, and then concluded with the provision: "That none of such provisions *shall be in conflict with the laws of the State in which the leased property is situated.*" App., *infra*, pp. 103-104.

Public Land Laws, generally, and which demonstrated the inapplicability of those decisions originally relied upon. It is, therefore, necessary to consider the original opinion, and particularly the decisions relating **generally** to the Public Land Laws. This consideration serves as a predicate for an examination of the second opinion and the decisions interpreting the Leasing Act. Also it will place the *Boesche* case in proper focus.

A. The Decisions Relating To The Public Land Laws As Respects The Nature Of Inceptive Rights While The Legal Title Remains In The United States.

The decisions and jurisprudence relative to the disposition of lands pursuant to the Public Land Laws, have developed within the framework of the following propositions: (1) " . . . The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations. 'And it is not **for the courts** to say how that trust **shall be administered.** That is for Congress to determine.' " *Alabama v. Texas*, 347 U. S. 272, 273 (1953);[35] (2) Congress has delegated authority over the administration and disposition of the public domain, to the Secretary of the Interior and the Land Department. *Best v. Humboldt Mining Co.*, 371 U. S. 334 (1962);[36] and (3) As respects such public domain, " . . . the power of Congress is exclusive

[35] Cf. *Standard Oil Co. of California v. U. S.*, 107 F. 2d 402, 409 (C. C. A., 9th, 1939), *certiorari denied* 309 U. S. 654, 309 U. S. 673: ". . . The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended . . ."

[36] Cf. page 339: ". . . Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected . . ."

and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter **that is not consistent with full power in the United States** to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them . . ." *Utah Power & Light Co. v. U. S.*, 243 U. S. 389, 404 (1916).

As respects the first two propositions above noted, we digress in order to pose these propositions, to-wit: Where is there any "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands"[37] is properly vested? And, assuming the Leasing Act contemplates that someone will "fill the interstices," where has Congress delegated authority so that "federal courts must fill the interstices"?[38] As respects both questions posed, are not these matters delegated by Congress **solely and exclusively** to the Secretary of the Interior?[39] As respects the third proposition, con-

[37] First opinion of the majority, R. 80.

[38] Second opinion of the majority, R. 110.

[39] Title to the land still being vested in the United States, are not such matters within the sole jurisdiction of the Secretary under Section 32 of the Act (App., *infra*, p. 106) for he "is authorized to prescribe . . . regulations . . . and to do any and *all things necessary* to carry out and accomplish the purposes of" the Act? One premise for the decision in the *Boesche* case, was the fact that title to the land, in the case of a lease, remained in the United States, yet this Court limited the effect of the decision with this circumscribing *caveat:* "We sanction no broader rule than is called for by the exigencies of the general situation *and the circumstances of this particular case.* We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." 373 U. S. 472, 485.

sidering the Secretary has granted Wallis the lease, wherein is local law "not consistent with the full power of the United States," when such local law merely says that by these private transactions in light of the local Statute of Frauds, McKenna and Pan Am **have not** acquired an interest in Wallis' lease? More particularly, how does such application of local law affect or frustrate the "policy" **against** "monopolies"?

In considering the cases relating to the Public Land Laws, it should be remembered that the "policy" against "monopoly" is not unique or peculiar only to the Leasing Act. For we do not know of a single Public Land Law (disposing of rights generally to the public) wherein this same "policy" does not inhere, for all such Acts that we have found have acreage limitations as respects permissible holdings.[40] Yet the decisions relating to such Public Land Laws, generally, hold that local law is applicable to private transactions and dealings affecting inceptive rights in "public lands," where the "legal title" is still vested in the United States. And this without any suggestion or intimation that it conflicts with the statutory "policy" against "monopolies." Furthermore, where statutory "policy" was being frustrated by private contracts relating to such inceptive rights, this Court has noted that it was Congress that corrected the situation, rather than say-

[40] Cf. *U. S. v. Trinidad Coal* N *Coking Co.*, 137 U. S. 160, 166 (1890), Rev. Stat. sec. 2347, 30 U. S. C. 71, as to coal. In the homestead laws (Rev. Stat. sec. 2289; 26 Stat. 1097; 43 U. S. C. sec. 161), the timber and stone laws (20 Stat. 89; 27 Stat. 348; 43 U. S. C. sec. 311), the desert-land laws (19 Stat. 377; 26 Stat. 1096; 43 U. S. C. sec. 321), the laws pertaining to underground water reclamation grants (41 Stat. 293; 43 U. S. C. sec. 351), the Taylor Grazing Act, as it relates to homesteads 48 Stat. 1272; 43 U. S. C. sec. 315f), and the mining laws (Rev. Stat. secs. 2320, 2329, 2331; 30 U. S. C. secs. 23, 35).

ing that the "policy" of the statute conferred interstitial authority upon the Courts to do so.[41]

In considering the incipient "rights" of a homesteader, *U. S. v. Buchanan*, 232 U. S. 72 (1913), held that the entryman acquired the right to "treat the land as his own" though "legal title" remained in the United States, and this "right was in the nature of private property," saying, at page 77: ". . . The entry by Moore withdrew the land from entry or settlement by any other, and segregated the quarter-section from the public domain. **The legal title remained in the Government** until patent issued, but **as against all except the United States** he was the lawful possessor **clothed with an inceptive title . . . * * *** This view is sustained by the terms of the statute and **is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued.** But instead of doing so, it left the homesteader, who had acquired a possessory title, **to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate . . .**"

In *Gauthier v. Morrison*, 232 U. S. 452 (1913), suit was instituted by a homesteader **in a State court,** seeking protection of his inceptive "right" to the land, and the State court dismissed for want of jurisdiction, since it appeared that the claim depended upon a matter assumed to be within the jurisdiction of the Land Department. In

[41] In *Myers v. Croft*, 80 U. S. 291 (1871), at page 295: "This was felt to be a serious evil, *and Congress, in the law under consideration*, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation . . ."

reversing, this Court held that, ". . . no interference with that [Land] department or usurpation of its functions was here sought or involved. * * * Congress has not prescribed the . . . mode in which such wrongs may be restrained and redressed . . . **but has pursued the policy** of permitting them to be dealt with **in local tribunals** according to **local modes of procedure.**"[42] In support thereof, the cases of *Lytle v. Arkansas*, 63 U. S. (22 How.) 193 (1859), and *Black v. Jackson*, 177 U. S. 349 (1899), are cited, among others. In the *Lytle* case, this statement appears, page 205: "This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, **he sold** it to Doctor Mathew Cunningham; it passed through several hands, till it was finally **owned by** Col. Ashley. Buildings and cultivated portions of the public lands were **protected by the local laws** of the Arkansas Territory; either ejectment or trespass could have been maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, **except the United States,** to **these transfers** of possession—neither could Cloyes be heard to disavow **his landlord's title.** He held possession for Ashley, and was

[42] The Court said, page 461: "Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. *But no interference with that department or usurpation of its functions was here sought or involved.* It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. *Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed,* as doubtless it could, *but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure.* And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court . . ."

subject to be turned out on a month's notice to quit." In the *Black* case, the local court had issued a mandatory injunction requiring an adverse possessor to remove certain improvements from a homestead claim, and, in reversing, this Court said, page 359: "What circumstances under the **laws of Oklahoma** will justify the use of a mandatory injunction for the purpose of ousting a person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt **by the decisions of the Supreme Court of that Territory** . . . " The Court then proceeded to note the extensive local laws dealing with possessory rights, and decided the case based on local decisions.

It is obvious from the foregoing decisions, that in the determination by State courts of private "rights" to possession of property, the legal title to which was in the United States, it was necessary for local law to be applied in resolving disputes which flowed from private transactions, such as deeds, leases, agreements to sell, and other similar types of contracts. This is made manifest from the case of *Marquez v. Frisbie*, 101 U. S. 473 (1879), when this Court said, page 475: "We did not deny the rights of the courts to deal with the possession of the land **prior to the issue of the patent,** or **to enforce contracts between the parties concerning the land** . . ." These cases illustrate the fact that as respects such incipient "rights," and even prior to the issuance of "legal title," the Courts apply local law to the private contracts concerning such rights.

Similarly, as respects the incipient "right" of a mining claim,[43] and in sustaining a **local** tax and resulting lien thereon, *Forbes v. Gracey*, 94 U. S. 762 (1876), states page 767: ". . . Those claims are the subject of bargain and sale, . . . They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. **This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.** Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, **be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.**" While recognizing that such incipient mining claim was "property" and thus subject to local tax law and lien, as well as vesting "the right to sell, transfer, mortgage and inherit," yet *Black v. Elkhorn Mining Co.*, 163 U. S. 445 (1896), held that local law could not impose a right of dower thereon, saying: ". . . We do not think that under the Federal statute the locator **takes such an estate in the claim that dower attaches to it.*** * * By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and **there is no condition that**

---

[43] In *Cameron v. U. S.*, 252 U. S. 450 (1919), at page 460: "A mining location which has not gone to patent is of no higher quality . . . than are unpatented claims under the homestead and kindred laws. *If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims . . .*"

hampers the right to convey by encumbering it with an inchoate right of dower . . ."[44]

And *Ducie v. Ford*, 138 U. S. 587 (1890), **affirmed the application of the local Statute of Frauds** to the assertion of an "equitable trust" on property held under a mining patent, which asserted "trust" was predicated upon an oral agreement made with the patentee **prior to issuance** of the patent by the United States.[45] ***Ducie* cannot be distinguished from the cases at bar.**

The foregoing cases dealing with the "rights" acquired by private individuals in "public lands," disclose that such "rights" are "property," assuming, but by no means admitting that the "legal title" to such lands is still vested in the United States. They further demonstrate that local law governs private contracts and transactions relating to such inceptive "rights" and thus may operate **indirectly** or incidentally on such "rights" by governing such transactions, all so long as local law: (1) is consistent with the "legal title" being vested in the United States, (2) is not contrary to, or in conflict with, an Act of Congress, and (3) does not purport to operate **directly** upon the legal title

[44] Similarly, *McCune v. Essig*, 199 U. S. 382 (1905), held that the incipient "right" of a homesteader, who died prior to the issuance of a patent, would not vest in his widow in accordance with local community property law, but such right would devolve in accordance with the Act of Congress. However, *Buscher v. Buscher*, 231 U. S. 157 (1913), held that upon issuance of a patent to a homesteader, the title so vested in the patentee as community property under local law.

[45] In *Williams v. U. S.*, 138 U. S. 514 (1890), *decided on the same day* as the *Ducie* case, this Court said, at page 522: "This brings us to the final contention . . . and *that the government pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title*, . . . * * * *In the main, we do not doubt these propositions of law*; . . ." We will consider this case in more detail hereafter.

to the land or attempt **directly** to regulate or vest legal title to the land. **But most important,** they clearly show that such operation of local law, does not **frustrate, interfere with or affect,** the "policy" of the various statutes as opposed to "monopolies."

B. **Decisions Relating To The Public Land Laws As Respects The Equitable Power Of The Courts And The Application Of Federal Law.**

The decisions by this Court disclose that the equitable powers of Federal Courts, whereby they apply Federal law, **only extend** to **reviewing** matters which transpired or were initiated before, the Land Department. And in exercising this power, it may only recognize "equitable rights" which had **originated with, or had been presented to, and been denied by, the Land Department.**

The leading case on this subject, is *Johnson v. Towsley*, 80 U. S. 72 (1871), where the Court said, at page 85: ". . . if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, **and by the laws which Congress had made on the subject,** it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."[46] We cannot emphasize too strongly, the statement from this extract, that the equitable power will operate

[46] The Court said, page 85: ". . . So also the register and receiver, . . . , often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence (continued)

"when, in equity and good conscience, **AND** by **the laws which Congress has made on the subject,** it ought to go to another . . ."[47] Thus **it is not alone sufficient,** that a party may be **seeking** an equitable remedy, but he **must also show** that "by the laws which Congress has made" the property "ought" to go to him. Here McKenna and Pan Am cannot show that by any law of Congress, the lease ought to have been awarded to them by the B. L. M. rather than to Wallis. McKenna and Pan Am took absolutely no steps to obtain the lease from the B. L. M. in accordance with the Act of Congress, but they claim only through private contracts made with Wallis,[48] **who was the only one who**

([46] cont'd) of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, *and by the laws which Congress has made on the subject,* it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."

[47] This rule was summarized in *Rector v. Gibbon,* 111 U. S. 276, at page 290, as follows: ". . . , the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity *had established his right to the land upon a true construction of the acts of Congress,* and by *an erroneous construction* the patent had been issued to another, the court would correct the mistake . . ."

[48] In *Oldland v. Gray,* 179 F. 2d 408 (C. C. A., 10th), *certiorari denied* 339 U. S. 948, where the plaintiff sought to impose an "equitable trust" on a Federal oil and gas lease, the Court said, at page 412: ". . . *Federal law did not create this asserted cause of action, nor is it an essential element thereof* in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties *arise out of a private contract,* and they must stand or fall upon its construction or effect . . ." In *Manuel v. Wulff,* 152 U. S. 505, 511 (1894), in speaking of the inapplicability of the Federal mining statute, to a conveyance of a mining location, this Court said: ". . . his claim passed to his grantee, not by operation of law, *but by virtue of his conveyance* . . ."

sought and obtained the lease "by the laws which Congress had made on the subject."

The foregoing principle of *Johnson v. Towsley*, was elaborated upon more fully in the case of *Marquez v. Frisbie*, from which we quote *(supra*, p. 45). In the *Marquez* case, the Court pointed out the circumstances under which an **action at law** will lie, and also when **a court of equity has jurisdiction,** holding the patent was **conclusive in courts of law,** as respects matters which transpired before the Land Department **prior** to issuance of the patent. But as respects **a court of equity,** the Court said, page 476: **". . . But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions,** and **in cases where it is clear** that these officers [of the Land Department] have **by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another,** to give appropriate relief.' *Moore v. Robbins*, 96 U. S. 530, 535; *Shepley v. Cowan, supra; Johnson v. Towsley, supra.*"[49]

In accordance with the foregoing is *St. Louis Smelting and Refining Company v. Kemp*, 104 U. S. 636, holding that equity could not afford relief, if the plaintiff could

[49] The derivative of the Court's power and authority to judicially review matters which transpire before the Secretary, as respects his disposition of the "legal title," is as stated in *Standard Oil Co. of California v. U. S.*, supra, at page 410: ". . . If Congress has clothed the Secretary with general authority to administer the grant, and *if his decision of fact in this instance was made within the scope of such authority*, there can be no doubt that his decision is conclusive on the courts, *in the absence*, at any rate, *of fraud or imposition* . . . Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises *must be exercised within the limits of due process*, . . ."

not "connect himself with the original source of title . . . (and) aver that his rights are injuriously affected **by the existence of the patent.**"[50] On the other hand, the case of *Marquez v. Frisbie, supra,* while acknowledging that Courts could "deal with the possession of land" prior to patent, and "enforce contracts between the parties concerning the land," yet it had this to say, page 475: "And we think it would be quite as objectionable to permit a State Court, while such a question was under the consideration and within the control of the executive department, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, **which would render its patents a nullity when issued.**" Since a State Court could not do this, necessarily a State Legislature could not by law, attempt to operate **directly** upon the title to the land, prior to patent, and "render (the) patents a nullity when issued." This was the purport of the Statute involved in the case of *Irvine v. Marshall,* 61 U. S. (20 How.) 558, and it is

---

[50] Cf. page 647: ". . . The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, *a court of law can afford no remedy* to a party alleging that he is thereby aggrieved. *He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title,* so as to be able to aver that *his rights are injuriously affected by the existence of the patent;* and he must possess such equities as will control the *legal title in the patentee's hands. Boggs v. Merced Mining Co.,* 14 Cal. 279, 363. It does not lie in the mouth of *a stranger to the title to complain of the act of the government with respect to it.* If the government is dissatisfied, *it can, on its own account,* authorize proceedings to vacate the patent or limit its operation." See also: *Steel v. St. Louis Smelting and Refining Company,* 106 U. S. 447, 454, and *Bohall v. Dilla,* 114 U. S. 47 (1884).

only to this extent that *Irvine* is competent authority, and the foregoing decisions disclose the error of the first opinion in applying it to the facts here involved, and, in accepting it as controlling.[51]

It was the rule announced in the foregoing cases (and some discussed hereafter) which required the majority of the Court below to retreat from (if not abandon) the predicate for the original opinion. This it did in an obscure fashion in the second opinion, when (R. 108) it said: "It should be noted that the actions before the district court, and before this Court on appeal, **do not seek to overturn the decision of the Secretary awarding the lease to Wallis.** McKenna and Pan American **were not applicants who competed with Wallis** before the Secretary. Indeed, it is evident that McKenna and Pan American **supported Wallis's claim to the Secretary** that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of 'competing claimants,' the Secretary's decision **would be subject to judicial review only** if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what consti-

---

[51] Additional reasons why the *Irvine* case is not controlling here, are: (1) the Statute involved was not a Statute of Frauds, for the case was before the Supreme Court on a demurrer, and the decision upon remand (Cf. *Irvine v. Marshall and Barton*, 7 Minn. 286, 1862) discloses there was a written contract involved; (2) the "legal title" to the land was still vested in the United States, whereas here the "title" to the lease has been given by the Land Department to Wallis; (3) *both parties* in the *Irvine* case were asserting inceptive "rights" to the land involved; and (4) the "legal title" to the land being in the United States and thus the matter being within the jurisdiction of the Land Department, the foregoing cases disclose that the Federal court had no more authority to decide "title" or, purport to vest "title," by imposing an "equitable trust," than did the State court. Cf. *Marquez v. Frisbie, supra.*

tutes 'public lands' was erroneous as a matter of law. E. g., *Morgan v. Udall*, D. C. Cir. 1962, 306 F. (2d) 799."[52]

The foregoing discloses the extent to which a Federal court may apply Federal law, under the Public Land Laws generally, as respects "equities" asserted by a third person, where such "equities" originate **prior** to the severance of the "legal title" from the United States. These cases disclose that it is only where such "equities" originate in proceedings before the Land Department—where the parties are "competing claimants," that the Federal Courts might adjudicate under Federal law. On the other hand, if such "equities" do not so originate, but only originate prior to issuance of "legal title" and from a private contract or dealings had with the **only one** having inceptive "rights," then the "equities" are governed by "local law," in that local law governs his rights and remedies as respects such private transactions.[53]

---

[52] In light of the foregoing decisions *by this Court*, which were cited to the Court below, it is ironical that the majority opinion chose to cite *Morgan v. Udall* in support of this statement. Wallis was a party to that suit, along with the Secretary of the Interior, and the suit by Morgan sought judicial review of the Secretary's *award to Wallis of the very Federal lease here involved*. The decisions above cited disclose that Morgan's suit is the *only instance* where a Federal court of equity might have jurisdiction to apply Federal law, and, impose an "equitable trust" on the "title" to a Federal lease after issuance by the Secretary. For Morgan's claim *originated* with the Land Department and he had initially sought the lease (adversely to Wallis) *from and before* the Land Department. Morgan *was not* (as are McKenna and Pan Am) claiming the lease *by and through Wallis*.

[53] We submit the same law is applicable to the cases at bar, for the asserted rights of both McKenna and Pan Am originate from private contracts with Wallis, entered into prior to the issuance of the lease to Wallis. They did not claim "adverse" to him before the B. L. M., but now claim through and under Wallis, and, as the Trial Court held, such contracts *did not even deal* with the application for the lease which ultimately issued.

That jurisdiction of a Federal court to apply Federal law **does not extend** to private transactions and contracts had with one **who is the only party** dealing with the Land Department, is clearly demonstrated in the case of *Williams v. U. S., supra.* There Williams made a "desert-land" entry, and then purported to "sell" eighty acres thereof by warranty deed for $5,000.00, and the "purchaser" spent approximately $60,000.00 in erecting a quartz mill thereon. It was apparent that Williams then devised a scheme to defraud the "mill owners," and he did not do the required reclamation work, but relinquished and cancelled his "desert-land" entry. At the same time he set about obtaining title thereto through the State, since the State was entitled to select the lands under an appropriate Act of Congress. The "legal title" was granted the State, and Williams then acquired from the State. The Court set aside the transfer by the Secretary to the State because of "inadvertence and mistake," occurring in the Land Department, which had resulted in the Secretary's approving the State's selection list. This "mistake" **did not** relate to Williams' private transaction with the "mill owners," but the Court recognized the overwhelming "equities" in favor of the "mill owners," resulting from their private contract with Williams, and his conduct[54] in attempting to defraud them. In answer to Williams' argument, that the "legal title" had properly vested in the State in accordance with the Act of Congress and that the "government pays no attention to private parties who have transactions in re-

[54] We remind the Court, that there is no finding of facts, in the case at bar, that Wallis attempted by scheme or artifice to defraud the plaintiffs under the contracts here involved, but assuming, *arguendo*, that such were the case, local law provides an adequate remedy, as noted by both Judge Wright and Judge Wisdom, each of whom was trained in the Civil Law which prevails locally.

spect to public lands before it parts with its title," the Court said: "In the main, we do not doubt these propositions of law." However, the Court noted that had the "equities" in favor of the "mill owners" been called to the attention of the Secretary, since the law required his approval of the selection list, he would have been justified in declining to certify the list, saying at page 524:

> ". . . **It (the statute) gives the power to the Secretary to deny this application of the State,** and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government."

In connection with this holding, these propositions should be noted: (1) The Court held that the Secretary had the "power" (not the "duty") to consider the "equities" arising from this private transaction; (2) it did not suggest that the equity power of the Court was such, **that under Federal law,** the private contract with Williams would permit the imposition of an "equitable trust" upon the "legal title" held by Williams,[55] and (3) on the contrary, it held that the Land Department might hold the "legal title" in the "government until, within the limits of existing law or by special Act of Congress," the "mill owners" would be able "to obtain title from the government." But more important still, is the holding that under the Act of Congress the Secretary had been granted the "power" to

[55] As heretofore noted, this decision was handed down *on the same date, as Ducie v. Ford,* Cf. *supra,* p. 47, for comment and comparison.

take cognizance of the "equities" arising from this private contract and transaction. For such grant of "power" by Congress to the Secretary, completely negatives and precludes any authority or jurisdiction in the Federal courts over such "equities," whether as a court of equity, or, interstitially under Federal law.

These cases, we submit, conclusively demonstrate that Federal courts have no jurisdiction to apply Federal law to such private transactions. The Secretary has the "power" to consider such "equities", but where he has not done so, or does not choose to, the parties are relegated to local law. As heretofore noted[56] as respects inceptive rights, the "policy (is) to leave the protection of such possessory claims to the laws of the several States, . . . , it (the statute) left the homesteader . . . , to avail himself of the same rights that were open **to others holding lands, by title absolute or inchoate . . .**" As we have shown herein, the Secretary has done just that.

C. Decisions Relating To And Interpreting The Mineral Leasing Act, Are Contrary To The Decision Below.

In administering the Leasing Act, the Land Department has consistently applied thereto, the cases and decisions relating to the Public Land Laws, generally, as respects one who holds "inceptive rights" thereunder.[57] And,

---

[56] Cf. *U. S. v. Buchanan, supra*, p. 43.

[57] The Land Department decision in *Lula T. Pressey*, 60 I. D. 101 (1947), states at page 102: "It was well settled long prior to the passage of the Mineral Leasing Act that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed (citing cases) * * * Shortly after the passage of the Mineral Leasing Act, (continued)

as heretofore noted, the Land Department, in interpreting the Act, has consistently held that a Federal lease conveys an interest in the land. The decisions of the Courts in interpreting and applying the Leasing Act, are entirely consistent with this position of the Land Department.

One of the first decisions construing the Act, was the case of *Hodgson v. Federal Oil & Development Co.*, 274 U. S. 15 (1927). In the Court below, Wallis asserted that this decision was controlling in his favor. However, the second opinion of the majority held (R. footnote 7, p. 114) that: "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states." We submit this holding is in error, and that the case does, in fact, support the position of Wallis. Before considering the position of the majority, and the *Hodgson* case, these matters should be borne in mind, to wit: (1) *Hodgson* was a suit in equity, (2) it was decided in the "pre-*Erie*-pre-*Guaranty Trust Co. v. York* era," and (3) **the rule** of *Johnson v. Towsley*, that courts of equity would impose a "trust" on the "legal title," when "in equity and good conscience **AND** by the laws which Congress has made on the subject, it (the "legal title") ought to go to another . . ."

The *Hodgson* case arose in Wyoming and Hodgson was attempting to impose an "equitable trust" upon a lease issued to the oil company pursuant to § 18 (App., *infra*, pp. 90-91) of the Leasing Act. Of importance is the fact

---

([37] cont'd) ***the same rule was held to apply to applications filed under that act . . . This rule has been followed repeatedly by the Department,*** both with respect to applications for permits and for leases. (citing I. D. decisions)"

that § 18 was **a special "relief" provision** of the Act designed to fit a particular situation, and, to afford relief to those whom Congress considered had suffered a hardship as a result of the "withdrawal order" of the President issued September 27, 1909.[58] Section 18 provided that if those who were in possession prior to July 3, 1910, under claims (pursuant to the pre-existing placer mining law) to any oil and gas bearing land incorporated in the "withdrawal order," were still in possession (undisputed prior to July 1, 1919), they would, upon surrender of their rights (under certain conditions and within a delay), be entitled to the issuance of a lease. Of particular importance as respects this case is the fact that § 18 **specifically provided** that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming **through or under him** by lease, contract, or otherwise, as their interest may appear."[59] Hodg-

[58] In the *Boesche* case, *supra*, the Court said, page 480: "Public lands valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with a rapid depletion of petroleum reserves under this system, the President issued a proclamation withdrawing from further entry pending the enactment of conservation legislation upwards of 3,000,000 acres of land in California and Wyoming . . ."

[59] We ask the Court to give particular consideration to this quoted provision. It *does not apply* to leases issued *generally* under the Act, but it *only applies* to leases issued under this *special and restricted section*. It should be noted that were this provision applicable generally to the Act, it would cover and include the precise situation here involved. McKenna and Pan Am are claiming the lease issued to Wallis, *not* (as the majority concedes) as "competing claimants" before the B. L. M. but (to employ the language of this special provision) "through and under (Wallis) by . . . contract, or otherwise." The majority below, of course, did not hold *this provision* applicable to the cases at bar, since it was a *special provision*. But the holding of the majority is to the effect, that Congress intended that this very provision *be supplied to the Act generally*—through the process of "federal courts must fill the interstices" ! ! ! The majority said: "Whether the lease from

(continued)

son was claiming that he owned an undivided interest in the placer mining claim, which the oil company had surrendered and in return for which it received the lease issued under § 18 of the Act. Hodgson asserted two predicates for his recovery, to-wit: first, he claimed that he would be entitled to a lease under § 18 by surrendering his placer claim, and, second, he claimed that his grantors were co-owners of the placer claim with the oil company, and being co-owners, a resulting fiduciary relationship was established between them and this relationship precluded a co-owner from acquiring and asserting an adverse title, thus he was entitled to impose an "equitable trust" on the legal title held by the oil company. The Court found that the co-tenancy accrued at different times and by different instruments purporting to convey the full title to the claim.

As respects the assertion that Hodgson was entitled to recover under § 18 of the Act, after pointing out that he had not complied with the Act, the Court applied the rule of *Johnson v. Towsley*.[60] We submit, that in disposing

---

([59] cont'd) the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law." (R. 80.) This express provision of the Act is restricted in its application by Congress, but the majority now says that Congress intended the Courts should supply this provision and make it applicable to the Act generally.

[60] The Court said, page 19: ". . . The Oil and Development Company did not obtain *what otherwise would have been granted to them;* and the principle under which the patentee was declared trustee for another in such cases as *Silver v. Ladd*, 7 Wall. 219, and *Svor v. Morris*, 227 U. S. 524, *does not apply. Anicker v. Gunsburg*, 246 U. S. 110, 117, holds: 'In order to maintain a suit of this sort the complainant *must establish* not only that the action of the Secretary *was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease*, and *that it was refused to him because of an erroneous ruling of law by the Secretary.*'"

of this phase of the case, the Court applied Federal law to **the extent permissible,** and, thereby disposed of the only contention asserted **to which Federal law was applicable.** But more important still, it should be observed that the Court applied to the Leasing Act, cases which dealt with the Public Land Laws, generally, and more particularly it treated the matter as though the "legal title" to the lease had vested.

On the second phase of the case, having to do with the question of a fiduciary relationship resulting from cotenancy, we submit that, the Court was sitting and functioning as any Federal court of equity would have, in a diversity case during the "pre-*Erie*-era." In disposing of the question, the Court noted that the rule relative to fiduciary relationship between co-tenants did not apply if, "the interests of the cotenants accrue at different times, under different instruments, and neither has superior means of information respecting the title." In support of this rule, which it called an "exception," it cited a decision by this Court and several decisions by the Supreme Courts of various States, and concluded by saying: "We know of no opinion by the courts of Wyoming to the contrary."[61] It was this last statement, Wallis submits, which constituted an acknowledgment by the Court, that it was bound to follow local law, and, would have done so, if there had been a local decision from Wyoming (the *situs* of the property) on the question. This being the era preceding the

[61] The Court said, page 20: ". . . This exception to the general rule is recognized in *Turner v. Sawyer*, 150 U. S. 578, 586; *Elder v. McClaskey*, 70 Fed. 529, 546; Freeman on Co-Tenancy and Partition, § 155; *Shelby v. Rhodes*, 105 Miss. 255, 267; *Sands v. Davis*, 40 Mich. 14, 18; *Joyce v. Dyer*, 189 Mass. 64, 67; *Steele v. Steele*, 220 Ill. 318, 323. We know of no opinion by the courts of Wyoming to the contrary."

"doctrine of abstention," and while in the pre-*Erie*-era, nevertheless under the doctrine of *Swift v. Tyson*, local decisions controlled and applied "to rights and titles to things having a permanent locality, such as rights to real estate." **This very doctrine was recognized and applied by the Fifth Circuit** in a decision handed down while the case at bar was pending on rehearing, which decision was authored by the same Judge **who wrote the two majority opinions below.** *The Leiter Minerals, Inc., v. U. S., supra*, p. 33, footnote ~~29~~ 30.[62] As respects the holding in *Leiter*, with reference to applying local law to transactions involving real estate,[63] the Court said: ". . . in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available." We submit that this is precisely what the Court meant in the *Hodgson* case when it said: "We know of no opinion by the courts of Wyoming to the contrary." In *Clearfield Trust Co. v. U. S.*,

---

[62] In *Leiter*, the Court said, page 90: ". . . While this is not a diversity case controlled by the Erie doctrine (Erie R. Co. v. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), the rules of decision act always had had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character, Swift v. Tyson, 1842, 41 U. S. (16 Pet.) 1, 18, 10 L. Ed. 865. *As to such matters, in the absence of a controlling decision by the highest court of the State*, we should be guided by the best evidence available . . ."

[63] In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. C. A. 2nd, 1962), the Court said, page 444: ". . . Even the celebrated opinion, now rejected, upholding the power of Federal courts to disregard state decisional law in certain areas, recognized that state law should be looked to as regards 'rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature,' Swift v. Tyson, 16 Pet. 1, 18, 41 U. S. 1, 18, 10 L. Ed. 865 (1842) . . ."

318 U. S. 363 (1942), and as respects *Swift v. Tyson*, this Court noted, page 367: ". . . And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law **rather than a choice of a federal rule designed to protect a federal right, . . .**" In *Hodgson* the Court was concerned with a placer mining claim and the law applicable thereto, for it was that which gave rise to the lease, and **the majority below conceded that a mining claim "was property in the fullest sense of that term."** Thus being "property" and **admittedly subject to local law,** why would this Court in *Hodgson* have had occasion to fashion "federal law" with reference to a mining claim? In the case of *Ducie v. Ford, supra,*[64] **the sole question presented,** was the applicability of the local Statute of Frauds, where the plaintiff was attempting to assert an oral agreement with reference to a mining claim, and thus impose an equitable trust **after** the patent issued. Applicability of the local Statute was affirmed by this Court.

We submit that it was error for the majority to characterize *Hodgson,* "as fashioning a federal law of fiduciary relationship, . . ." and *Hodgson* is controlling in favor of Wallis.

In the case of *Witbeck v. Hardeman,* 51 F. (2d) 450 (1931),[65] **decided by the Fifth Circuit,** the Court was concerned with a mere permit to prospect for oil, issued under the Leasing Act. During the course of that decision and in considering the Leasing Act, it was stated that: ". . . a lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to

[64] The *Ducie* case cannot be distinguished from these cases at bar.
[65] Affirmed *Hardeman v. Witbeck,* 286 U. S. 444 (1931).

a patent."[66] While, in affirming, this Court rested its decision solely on the ground that the Secretary had properly awarded the permit, it did not take occasion to repudiate the statements made by the Fifth Circuit in its opinion.

In the case of *Alaska Consolidated Oil Fields v. Rains*, 54 F. (2d) 868 (C. C. A., 9th, 1932), the Court held that one who held an oil and gas prospecting permit issued under the Leasing Act, had "such an interest in the land" that it would be subject to a mechanic's lien for labor under the laws of Alaska."[67] As noted, this holding

---

[66] The opinion contains these statements: ". . . Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietory interest of the United States in the land never ceases. Nevertheless, *the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent* . . . Furthermore, *since a mere permit* to *prospect* for oil or gas under 30 USCA § 221, *is exclusive*, . . . , with a preference right to lease the whole land . . . ,' *the permit may be of as much value and importance as the lease which it controls. The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it . . . It is true that neither lease nor permit ends the interest of the United States in the land involved . . . But looking at the substance of the matter, we think that the disposition of the land has already been made by the action of the Secretary in issuing a permit on the terms fixed by the law and the regulations . . .*"

[67] The Court said, page 874: "*In view of the decisions with reference to the inchoate rights of a locator under the placer mining laws before discovery, and the analogous but more definitely determined rights of a locator who has acquired a prospecting permit, . . . We hold that he is an owner of an interest in the land* within the meaning of the laws of Alaska under consideration, and *that his interest therein is subject to a mechanic's lien*, without prejudice to the rights of the government."

was **based solely** on cases relating to inceptive rights under the placer mining act.

Blackner v. McDermott, 176 F. (2d) 498 (C. C. A., 10th, 1949), **was admitted by the majority below to be contrary to its decision.** There the plaintiff, as is McKenna, was asserting a "joint venture" for the acquisition of a lease, and by virtue of the alleged "joint venture" attempting to impose an "equitable trust" upon the lease issued under the Leasing Act, and the Court stated, page 500: ". . . Jurisdiction of the Court resting upon diversity of citizenship, **and the action not being one under federal law,** the relationship of the parties each toward the other in respect of the leasehold estate **must be determined by the law of Wyoming . . .**" We have heretofore noted the case of *Oldland v. Gray, supra*, where the plaintiff held a prospecting permit issued under the Leasing Act, which he assigned, but under which he reserved an overriding royalty on the lease to be issued. In a suit to impress a trust upon the production obtained under the lease, the Court said, page 412: "**. . . Federal law did not create this asserted cause of action, nor is it an essential element thereof** . . . The asserted rights of the parties **arise out of a private contract,** and they must stand or fall upon its construction or effect . . ."

While the case of *Pan American Petroleum Corporation v. Pierson*, 284 F. (2d) 649 (C. C. A., 10th, 1960), certiorari denied 366 U. S. 936, was a suit to enjoin officials of the Land Department, and thus directly **involved** the United States, yet the Court treated a lease issued un-

der the Leasing Act as being entirely analogous to a patent to land.[68]

Finally, there is the recent decision, rendered while these cases were pending on rehearing below, of *Bolack v. Underwood*, 340 F. (2d) 816 (C. C. A., 10th, 1965). In *Bolack*, as in the cases at bar, the suit involved a dispute between private individuals over the ownership of an oil and gas lease covering Federal lands. Both parties held assignments of the Federal lease executed by the lessee, however, the first assignee (Bolack) had not recorded his assignment as required by the laws of New Mexico, although it had been filed in the records of the Federal Land Office. In holding in favor of the junior, or second, assignee of the lease (Underwood), the Court applied local law, saying at page 819:

> "The answer to the question of whether Underwood may be considered an innocent purchaser for value is dependent upon whether the records at the Federal Land Office constitute constructive notice to a purchaser of a federal lease. New Mexico law is to the effect that the federal land office records do **not** constitute such notice, as sections 65-2-1

[68] The Court said, page 654: ". . . This rule is said not to be applicable in the instant case because upon the issuance of a patent title passes from the United States to the patentee whereas under the Mineral Leasing Act the United States retains legal title. * * * We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land . . . Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas UNDERLYING THE LEASED PREMISES. SIMILARLY THE ISSUANCE OF A PATENT IS THE LAST ACT OF THE GOVERNMENT IN DISPOSING OF THE NON-MINERAL LANDS OF THE PUBLIC DOMAIN . . ."

et seq., N.M.S.A., require that assignments of interests and royalties in federal oil and gas leases be recorded in the appropriate county clerk's office, and sections 71-2-1 et seq. provide that an instrument that is not recorded cannot affect the title or right to real estate of any purchaser in good faith. New Mexico law also provides that an interest in an oil and gas lease constitutes an interest in real property, e. g., Rock Island Oil & Refining Co. v. Simmons, 73 N. M. 142, 386 P. 2d 239. **There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases, and in such instances, where no right of the federal government is involved, state law governs.** See Bank of America Nat. Trust & Sav. Ass'n v. Parnell, 352 U. S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93; United States v. Union Livestock Sales Co., 4 Cir. 298 F. 2d 755, 96 A.L.R. 2d 199.

"Viewed in this posture, the problem at hand is reduced to the simple issue of whether under New Mexico law Underwood is chargeable with notice of the prior assignment to the Bolacks . . ."

Here, then, is a decision which squarely contradicts the decision below, for it holds that "There is no federal statute governing disputes between private individuals regarding rights to federal oil and gas leases,"—yet the majority below holds that the Leasing Act itself requires the Courts to fashion a law applicable to such disputes. But more important, the decision holds that in such a private dispute, "no right of the federal government is involved," —and while the majority below could never point out wherein any right, or, interest of the federal government

was involved in these private disputes, yet it held that "uniformity" in the law applicable to such disputes is required. The decision in *Bolack* is entirely in keeping with the administrative application of the Act, by the Secretary.

The foregoing review of the jurisprudence relative to the Leasing Act, discloses that those who hold "inceptive rights" (permits) under the Leasing Act, as well as leases themselves, have and own a "property right" as respects third persons, and, that the Land Development had granted the "legal title" thereto. Aside from the specific holding that State law governs private contracts with reference thereto, these cases treat the holders of such "rights" as being entirely analogous to those who hold such "inceptive rights" under the Public Land Laws, where the "legal title" is vested in the United States. This Court in the *Hodgson* case, applied the rule of *Johnson v. Towsley* with reference to a lease issued under the Leasing Act, and that rule proceeds on the assumption that "legal title" had issued from the United States, and, we submit that, if that be true, then it is "property" vested in Wallis, and, being "property," the "legal title" to which has been conveyed by the United States, it is necessarily "property" subject to local law, at least as respects private transactions relating thereto. Cf. *Wilcox v. McConnel, supra.*

On the other hand, if because it is **only a lease,** where the United States has not parted with the title to the land and because the Secretary continues to administer the land and the lessor's rights under the lease—if these factors are such that the decisions above noted with reference to the Public Lands Laws **are not applicable** as respects Wallis' private transactions with third persons, then we are forced to ask where does the Federal court get

or acquire jurisdiction to decide these cases under any law? For this very acknowledgment requires the holding that the matters are still within the jurisdiction of the Land Department, and it is the Secretary (not the Courts) who has jurisdiction under the Congressional grant of authority to administer Public Lands and the Leasing Act. In *Williams v. U. S., supra,* the Court said that the Secretary had the "power" to consider "equities" flowing from a private contract made with one who had an inceptive "right" to land, while the "legal title" was in the United States, and the Secretary could withhold the title. However, we submit that the Secretary has not deemed it expedient or wise to involve the Land Department in such "private transactions," and has seen fit to leave the parties to the local courts and local law. For Land Department involvement would not further its **primary function** of supervising the Public Domain and the disposing of "legal title," which of itself is a task of sufficient magnitude.[69]

Considering the foregoing jurisprudence, and its treatment of "rights" held under the Leasing Act as being

[69] *Best v. Humboldt Mining Co., supra,* footnote 8, page 339, noted the magnitude of the work imposed upon the B. L. M. as respects mining-claim cases, saying: "In the fiscal year 1961 there were a total of 27,228 mining-claim adjudication cases closed during the year. These included 7,457 title-transfer cases (e. g., patent applications and land-disposition conflicts), and approximately 20,000 mining-claim investigations by the Bureau's mining engineers for the purpose of determining validity or invalidity . . ." In the *Boesche* case, notice was taken of "the magnitude and complexity of the leasing program conducted by the Secretary," and reference (footnote 13) made to the fact that: "In many instances there are multiple applications for leases of the same land, sometimes hundreds for the same tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the Santa Fe Land Office alone, many of which affected the same acreage . . ."

similar to inceptive "rights" held under the Public Land Laws, generally, it necessarily follows that many titles to Federal leases have been acquired and dealt with on the basis of this analogy, and, on their holding that local law governs private transactions relating thereto. It is submitted that if the decision below is allowed to stand, and such titles have always been subject to a yet undefined Federal law, then many such titles will have been put in jeopardy and rendered subject to serious question.

D. The *Boesche* Case As It Relates To Private Transactions Had By A Federal Mineral Lessee With Third Parties, Does Not Support The Decision Below.

The majority opinion on rehearing, as above noted, devoted considerable space to what this Court said in the *Boesche* case, concerning the nature of the "right" held by a lessee under the Leasing Act. While the majority did not so state, it is quite apparent that it relied on the language of the *Boesche* decision, to avoid the force and effect of the decisions above cited with reference to the Public Land Laws, generally, and, of course, those specifically interpreting the Leasing Act. We submit that this was an unwarranted and erroneous interpretation of that decision.

In the first place, and most important, the *Boesche* case **did not** involve a question of a Federal lessee's "rights" **as respects a private transaction with third parties.** That case involved **solely** the relationship and rights of a lessee with respect to the United States. The cases above cited which dealt with the nature of the inceptive "rights" under the Public Land Laws, generally, and which acknowledged that such "rights" were "property" as respects third persons, at the same time, specifically **excepted** the United

States. Thus *U. S. v. Buchanan, supra,* stated: "but as against **all except the United States he was . . .** clothed with an inceptive title." The sole question involved in *Boesche* was the administrative authority of the Secretary to cancel a lease for administrative error in its issuance.[70] That this was true, and that this was the sole question decided, is the fact that this Court was careful to point out, that: "We **hold only** that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases . . ."

We submit, that in deciding this narrow question, this Court did not hold, nor intend to hold, that a lessee under the Act **had less** rights, or that the "rights" which he had were less in the nature of "property," than those who hold inceptive "rights" under the Public Land Laws generally, all as respects dealings with third persons. As we read the decision, the burden was in showing that the lessee's "rights" fell in the same category as those who held inceptive "rights" under the other Acts, rather than being in the category of one who held a patent to the land, which would have terminated the jurisdiction of the Land Department.

Thus the Court pointed out that the Secretary has such administrative power of cancellation "with respect to other **kinds of interests in public lands,**" and said: "no matter how the **interest conveyed** is denominated the true line of demarcation is whether as a result of the transac-

[70] It is significant to note the comment in *Boesche* as respects *Pan American Petroleum Corporation v. Pierson,* supra, viz.: "Because of *a seeming conflict* in principle between (this case), and *Pan American Petroleum Corporation v. Pierson* . . . , we brought (this) case here." No further mention was made of that decision.

tion 'all authority or control' over the land has passed . . . or whether the Government continues to possess some measure of control over them." These statements do not deny, but, on the contrary, affirm, that such inceptive "rights" are "kinds of interests in public lands" and acknowledge that such "rights" are an "interest conveyed." And the foregoing cases demonstrate that such "rights" are "property" as respects third persons. Hence, when this Court said that, "a mineral lease does not give the lessee anything approaching the full ownership of a fee patent, nor does it convey an unencumbered estate in the minerals," it did not deny, nor, we submit, intend to infer, that such lessee did not have a "right" which was in every sense "property,"[71] in the same sense that other inceptive "rights" are treated and considered as "property." These statements were made in a context which contemplated the jurisdiction of the Land Department.

The very lease[72] which the Secretary issued to Wallis states: "Section 1, **Rights of lessee**—The lessee is **granted the exclusive right and privilege** to drill for, mine, extract, remove and dispose of all the oil and gas deposits, . . . in the lands leased, . . . for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities . . . ," and it further states: "Sec. 8. **Heirs and successors-in-interest.**—It is further agreed that each obligation hereunder shall extend to and be binding upon, and **every benefit shall inure to, the heirs, executors, administrators, successors, or assigns** of the respective parties hereto."[73]

---

[71] Section 17 of the Leasing Act, as amended in 1935, speaks of "lease owner." App., *infra*, p. 90.

[72] R. 57.

[73] Section 28 of the Leasing Act speaks of "lessee, assignee or beneficiary" of a lease. App., *infra* p. 102.

We ask the Court to compare the foregoing, with the language of the initial mining act (App., *infra*, pp. 106-109) of May 10, 1872, c. 152 § 3 and § 5, 17 Stat. 91, 92; R. S. § 2322 and § 2326; 30 U. S. C. A. 26, 28, which provides in part as follows: "Sec. 26. The locators of all mining locations . . . , **their heirs and assigns, . . .** shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of the veins, lodes . . . ," and "Sec. 28 . . . On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed . . . each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed . . . until a patent has been issued therefor . . . and upon a failure to comply with these conditions, the claim . . . shall be open to relocation . . . , provided that the original locators, **their heirs, assigns, or legal representatives** have not resumed work . . ." It was this language of the statute and more particularly the references to "heirs and assigns," that served as the basis for acknowledging that mining claims "are subjects of bargain and sale, . . . and the right to sell, transfer, mortgage and inherit is recognized by the courts." Cf. *Forbes v. Gracey, supra*, and *Black v. Elkhorn Mining Company, supra*. Yet as noted heretofore *(supra*, footnote 43, p. 46), "A mining location . . . is of no higher quality . . . than are unpatented claims under homestead and kindred laws."[74]

[74] In *Boesche*, while noting that a mineral lease "does not convey an unencumbered estate in the minerals," it referenced to *footnote 7*, saying: "In contrast, compare the interest of a mining claimant whose location is perfected." Yet the above statement, that it is "of no higher quality . . . than are unpatented claims" generally, and, *Black v. Elkhorn Mining Company, supra*, disclose there is no contrast. Moreover, in an opinion rendered by the Solicitor to the Assistant Secretary of Interior, dated

(continued)

We submit that the *Boesche* case did not render inapplicable to the "rights" of a lessee, the decisions relative to inceptive "rights" under the Public Lands Laws, generally, nor did it intend to relegate such "rights" of a lessee to any inferior or different status. And to the extent the opinion below on rehearing so interpreted it, such opinion was in error.

IV. The Majority Opinion Below On Petitions For Rehearing And The Devices Of "Assignments" And "Options."

The second majority opinion makes these statements: "We deal with claims that are, in essence, an alleged 'option' and an alleged 'assignment,' but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is sufficient federal interest for the substantive independence of the federal court . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment'—whether they may be oral or arise by operation of trust —implies we should look to the law of the state. But we are impressed by the fact that the [Act] represents a com-

---

([74] cont'd) January 12, 1945 (59 I. D. 4) these statements appear, pages 6, 10: ". . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause —it was concluded that leases were, in effect, of a more permanent nature and *vested the lessees with a property right and estate for years in real property.* The rule adopted was said to be 'consistent with the purpose and intent of the leasing law.' * * * . . . On the other hand, a holder of a non-competitive lease has *an immediate leasehold interest in all of the lands subject to the lease for* 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . ."

prehensive scheme of federal regulation. Besides the policy directed at opposing monopoly . . . , Congress has recently expressed concern over a potentially dangerous slackening in exploration for development of domestic reserves . . . * * * It is clear that the [Act] recognizes the devices of 'assignments' and 'options' as concomitants to the public policy against monopoly . . . and . . . the public policy towards development . . . and increasing our domestic reserves." The foregoing is the essence of the predicate upon which the second opinion concluded that "the interest of the United States is directly affected" by these private transactions, and, that "this is an area for uniformity."

Several quick observations are suggested. As respects the failure of the Act to define "the terms 'assignment' and 'option' "—is this not a matter for the Secretary, under his delegated authority to administer the Act?[75] Considering the fact (as stated in the *Boesche* case) that in the debates in Congress concerning the Leasing Act "conservation through control was the dominant theme," and the further fact that the term "assignment" was in the original statute enacted in 1920—how could "recent concern . . . expressed by Congress" in 1960 over our "do-

[75] As respects the Leasing Act, and definition of terms used therein, *California Company v. Udall*, 296 F. 2d 384 (C. C. A., D. C., 1961), says, page 388: "An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute." If the Secretary thought that the defining of the terms "assignment" and "option" in some way furthered, or were material to, the "policies" which the majority finds present, it was his province to do so. Yet the Secretary has not seen fit to define these terms, thus indicating that private contracts of "assignment" or "option," do not "directly affect" the interest of the United States, and are therefore immaterial to the "policies" of the Act.

mestic reserves," have any bearing upon the original use of the word "assignment"?

The above quoted extracts from the second majority opinion, must be considered in the following context: Wallis, and Wallis alone, applied to the B. L. M. for the issuance of the lease, and, the lease was granted to him. At that time, and in connection with the issuance of the lease, the Secretary is presumed to have given consideration to all "policy" matters, and he is presumed to have concluded that the "policies" of the Act would be furthered by the issuance of the lease. In this light, the lease issued to Wallis. These suits seek a forced transfer of all or a portion of this lease. Local law has not said, and does not say, that transfers cannot, or could not, be made by Wallis to either of these plaintiffs. Local law does not prohibit or interdict transfers of Federal leases. Local law has simply said, in line with its public policy as reflected by the local Statute of Frauds, that the **particular private transactions** these plaintiffs had with Wallis, did not accomplish a transfer of the lease. Under these circumstances, how can it be said the "policy" of the Act is frustrated by this **negative** action of local law? Where does this "affect the interests of the United States"? How does uniformity in the decisions on these transactions further the policy, or, lack of uniformity frustrate the policy? The majority gives no answers to these specific questions, it gives only general conclusions. But in the final analysis, if "uniformity" in these matters is deemed essential, is not this the province of the Secretary? And is not his failure to take steps to require "uniformity" in these transactions, by appropriate regulations, evidence of his decision, and conclusion, that "uniformity" is not required? Not only

has the Secretary indicated that "uniformity" is not required, by refusing to adopt appropriate regulations, but, on the contrary and as we have heretofore shown, the Land Department has avoided involvement in these private disputes and, instead, relegated the parties to local courts and local law, all in accordance with the policy laid down by Congress in connection with the Public Land Laws, generally.

A. **Section 30 Of The Act Relative To The Secretary's Approval Of Assignments Or Subleases, As Interpreted By The Decision Below, Is Contrary To Past Decisions Interpreting The Leasing Act, And, Is Contrary To Sec. 30 (a) Of The Act.**

The second opinion, in stating that these suits deal with a claim that is, "in essence, . . . an alleged 'assignment', but which, ultimately, must be **approved** by . . . the Secretary," is completely in error, and fails to give proper consideration to § 30 (a) (App., *infra*, p. 104) of the Act. Thus "assignments" of Federal oil and gas leases are **no longer governed** by § 30 of the Act, **insofar** as **discretionary authority** of the Secretary is concerned, as distinguished from merely an **administrative function.** This is manifest from the Committee Report to Congress[76] concerning the proposed 1946 amendment, which added § 30 (a) to the Act. This states, p. 4: "Section 30 (a) is added to the Mineral Leasing Act. This section is designed **to apply to oil and gas leases only**, and **to except such leases from section 30** which will then apply to leases of minerals **other**

[76] Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress, *2nd Session*, H. Repts., 79-2, vol. 7-98.

than oil and gas. The section is designed to relieve the Department of the Interior of considerable administrative detail in approving assignments of leases and should eliminate much of the delay now incident to assignments or other transfer of leases." Here, then, is the clear expression of the intent of Congress that § 30 of the Act does **not apply** to the lease here involved, in light of § 30 (a), yet the opinions below relied, in the main, upon the erroneous assumption that § 30 applied, and the fact that an "assignment" of a lease "must be approved by . . . the Secretary."

As the Act was originally enacted, there was no specific statutory circumscribing of the Secretary's authority as respects the requirement of § 30 that: "No lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." (App., *infra*, p. 103). In *Williams v. U. S.*, *supra*, the Court, in speaking of the requirement of a statute that the certification after selection of lands by a State "be approved by the Secretary" said: "It gives him no mere arbitrary discretion . . . " Thus the **original requirement** of § 30 of the Act, that an assignment or sublease of a lease must be approved by the Secretary, gave him no "arbitrary" discretion, but his action must have had a reasonable relation to the interests of the United States, the furtherance of the policy of the Act, and, an efficient administration of the Act. It should be noted that the Secretary's authority, as respects assignments and subleases, was "negative" in that he could only **refuse to approve,** he could not **require or force** an assignment or sublease of a lease. However broad the Secretary's authority and discretion may have been under § 30, as respects such required "approval", we submit that it has been entirely

circumscribed, by the addition, in 1946, of § 30 (a) of the Act, which provides in part: "Sec. 30 (a). Notwithstanding anything to the contrary in section 30 hereof . . . The Secretary shall disapprove the assignment or sublease **only** for lack of qualification of the assignee or sublessee or for lack of sufficient bond." (App., *infra*, pp. 104-105.) Considering the fact that the Act allows the owner of a lease to "assign" the lease, and the Secretary may **only** disapprove **for these two restricted reasons,** we are forced to ask, where is there any interstitial authority?[77] We submit that by the addition of § 30 (a) to the Act, the sole relevancy which an "assignment" has to the "policy," as respects "monopolies," or, "domestic reserves," has to do with the question of the extent of the "acreage holdings" of

[77] It is interesting to note that when the previous "broad discretion" of the Secretary as respects "approval" under Sec. 30 as originally enacted, was to be narrowly circumscribed by the proposal of Sec. 30 (a), the Secretary apparently had no apprehensions about the "policy" of the Act suffering. This is disclosed by proceedings in Congress, when the 1946 Amendment was before the House, for final action after being reported by the joint committee, to-wit: "Mr. Fernandez. Mr. Speaker, this bill, S. 1236, as now approved by the conferees . . . * * * The second of these amendments did not meet with the full approval of the Department. The amendment *was intended to facilitate the assignment of leases in order to relieve the bottleneck in the Department of the Interior,* which has created a backlog of unapproved leases and which necessarily tends to impede and delay discovery of new petroleum reserves. The Department was *fearful that assignments could be so conditioned as to relieve assignees from some of the obligations of the original lessee, and to fully safeguard the Government and to meet the criticism of the Department,* the conferees on the part of the House drafted an amendment providing that upon approval of any assignment, the assignee must be bound by the obligations of the lease to the same extent as if he were the original lessee. This latter amendment was approved by the Department and was accepted by the Senate conferees and is now incorporated in the amendments." 79th Congress, 2nd Session, Vol. 92 Congressional Record, page 10222 (1946).

the proposed assignee. This is specifically provided for in § 30 (a), and this completely refutes the holding of the second majority opinion. In the Congressional comment last noted, we direct the Court's attention to the statement, to-wit: "and to **fully safeguard the Government** and to meet the criticism of the Department,"—does not this completely negative interstitial authority?[78]

Even as respects § 30 of the Act, prior to the 1946 addition of § 30 (a), the decisions interpreting § 30 did not attach any "policy" consideration to the requirement of "approval" by the Secretary, as the second majority opinion **now asserts** even with § 30 (a) added to the Act.

As a preface to a consideration of the decisions on this phase of the Act, we should first like to discuss the case of *Manuel v. Wulff*, 152 U. S. 505 (1894). This case concerned the "policy" of the mining statute, of restricting the benefits of the statute to "citizens" as opposed to "aliens." It was a contest over a mining claim, both parties claiming they had validly located the claim. It developed that defendant Manuel's claim had been initially located by his brother and he had in turn conveyed the claim to Manuel, who was an alien. The lower court held that since Manuel was not a "citizen" at the time of the purported conveyance to him, such purported conveyance amounted to an abandonment of the location by the grantor. In reversing, this Court said, page 511: ". . . , we are of

[78] The Committee Report referred to, *supra*, p. 78, fn. 77, discloses in connection with the proposed § 30 (a), that the Secretary of the Interior was complaining (p. 7) because it limited the Secretary's discretion to "disapprove" assignments "for good cause." And the foregoing statement to the House, by Rep. Fernandez, shows that Congress clearly intended to deny the Secretary any "discretion," as respects approval of assignments.

the opinion on this record that, as Alfred Manuel [the brother] was a citizen, if his location was valid, his claim passed to his grantee [defendant], not by operation of law, **but by virtue of his conveyance,** and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, **open to question by the government only."** Here then is a case of the "policy" of the statute being given consideration and "effect," in a case involving a private transaction relating to an inceptive "right," and **this Court reversed,** holding that the Act has no application to this private transaction, and that the "policy" is a matter for the government to enforce.[79] Such has been the rationale of the decisions relating to § 30 of the Leasing Act.

In one of the first cases under the Act, the same question was presented, where the plaintiff was attempting to enforce a "grubstake" agreement made with the grantee of an oil permit issued under the Leasing Act. The agreement was made prior to the issuance of the permit, but enforcement by "equitable trust" was sought, as respects the issued permit. We refer to *Isaacs v. De Hon*, 11 F. (2d) 943 (C. C. A., 9th, 1926). Defenses were asserted that (1) plaintiff did not allege he was a "citizen,"

[79] As respects the "policy" toward "aliens" which inheres in the Public Land Laws generally, "Bank of America," 59 I. D. 412, 414 (1947), contains this statement: "It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States. This pervading policy is to be found, for example, in the homestead laws . . . , the timber and stone laws . . . , the desert-land laws . . . , the laws pertaining to underground water reclamation grants . . . , the Taylor Grazing Act as it relates to the grazing of stock in grazing districts . . . , and the mining laws . . . It finds expression also in section 1 of the Mineral Leasing Act, . . ."

and (2) "permits," under the regulations, could only be assigned with the consent of the Secretary. The Court rejected both defenses, holding that the question of alienage **could only be complained of by the sovereign**, and, while it might be that plaintiff would "lose the fruits of this litigation by the refusal of the Secretary to approve the assignment," nevertheless the Court would hold defendant "to the obligations in his grubstake contract."

In *Witbeck v. Hardeman, supra*, the same defense was asserted as respects the required Secretary's approval of an assignment, and the Court said, page 453: ". . . This restriction on transfer applies to voluntary transfers, and will hardly be deemed applicable in case of death, bankruptcy, or **court decree.** But the difficulty is met by the just assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this his consent is to be implied, and may be compelled if refused. If such a transfer be decreed, he will no doubt, on request, enter his consent thereto, and make necessary substitution of bond, and do all else that is appropriate to perfect the transfer . . ." While this Court affirmed on other grounds *(supra*, p. 62) by ruling on the merits, it does seem that if it considered the foregoing ruling to be incorrect, it would have so noted. *Alaska Consolidated Oil Fields v. Rains, supra*, quoted the foregoing extract from the *Witbeck* case, with approval. In *Gibbons v. Pan American Petroleum Corporation*, 262 F. (2d) 852 (C. C. A., 10th, 1958), the Court said, page 854: "The fact that the lease assignments were unapproved by the [B. L. M.] is of no moment, since the assignee could not avoid their obligations by simply not offering them for approval," citing *Blackner v.*

McDermott, supra, and *Oldland v. Gray, supra*, the latter case stating at page 415: ". . . As we have said, the rights of the parties here do not arise out of the federal act. They have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law . . ." Also, the recent decision of *Bolack v. Underwood, supra*, gave absolutely no consideration to the question of the Secretary's required approval of an assignment and held there was no federal interest involved in a private dispute over the ownership of a Federal Lease.

The foregoing decisions interpreting § 30 of the Act, are entirely in accord with this Court's holding in *Manuel v. Wulff, supra*, and it and the foregoing cases stand for the propositions that (1) private contracts or transactions concerning these "rights," are not governed by the Act, nor the policy thereof, (2) as respects the Act and its "policy," the Government's rights or interests are to be asserted by the Secretary and when such private contracts are submitted for his approval, and (3) none of these cases attaches any importance or significance to § 30 of the Act, and its requirement of approval of "assignments," as respects such private contracts or transactions, which stand on their own merits, as contracts.

We submit that the foregoing discloses that the second majority opinion was entirely in error, as respects the significance it attached to the use of the word "assignment" in the Act, and the further requirement of approval of "assignments" as provided in § 30. **Since the Act does not even require filing of "options" with the Secretary, much less his "approval" thereof,** but only requires semi-

annual filings by the optionee giving certain data as respects all "options" held by such optionee (Cf. Sec. 27 of the Act, App., *infra*, p. 99), the foregoing cases are even more decisive as respects the "importance" attached by the majority to the reference, or provision in the Act, concerning "options."

B. **Recognition By The Leasing Act Of "Options" As Concomitants To The Public Policy Against Monopoly.**

The second opinion merely lumps together "assignments" and "options" as "concomitants of the public policy against monopoly" and makes absolutely no distinction between these two devices. Yet the history of the Leasing Act, and more clearly the circumstances which brought about the first legislation in 1946 with reference to "options," . . . discloses that there is not only a difference between "options" and "assignments" under the Leasing Act, but also that "options" have been relegated to a position of lesser importance.

In referring to "options" as concomitants to the "public policy" against "monopoly," this can be considered as true only by treating it in its broadest sense. **Yet,** we submit that, when "options" are considered in light of the circumstances and background that brought about legislative regulations thereof, the majority opinion is in error as to the significance which it attaches thereto.

There is an excellent article[80] by one of the leading authorities in this country on "public lands," which, to-

[80] "Oil And Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, page 309, 324, *et seq.*

gether with an opinion of the Solicitor to the Assistant Secretary of the Interior,[81] reflects the history behind the 1946 amendment to § 27 of the Leasing Act (Act of August 8, 1946). Briefly summarized, these authorities are to the following effect: Originally § 27 of the Leasing Act provided that "no person, association or corporation, shall take or hold at one time oil or gas leases or permits exceeding in the aggregate" a certain limited number of acres of land in any one State. The Land Department held that acreage included in prospecting permits covered by operating agreements would not be charged against the operator, as respects the acreage limitations of the Act. The issuance of prospecting permits was eliminated in 1935, and in lieu thereof, the Act provided for issuance of noncompetitive leases on lands not within a known producing structure. Initially this attitude as respects prospecting permits was applied to noncompetitive leases until 1938, when the Department ruled that an operating contract with reference to such a lease would be charged against the operator's acreage holdings (letter to LeRoy H. Hines, dated April 19, 1938, 1708342, "L" MB). In order to avoid and circumvent the effect of this ruling, the scheme was devised of taking options to acquire leases upon their issuance on the theory that this was not an interest in real estate, and would, therefore, not be charged against the acreage holdings of the optionee. There was no official ruling from the Department but reports indicated that there were conflicting opinions among the officials thereof as to the chargeability of options under § 27 of the Act. Considerable sums of money had been invested by the industry in "options", designed, primarily, to permit the optionee to go upon land and conduct geological and geophysical ex-

[81] 59 I. D. 4 (1945).

ploration, and, with, of course, the right to ultimately acquire a lease from the holder thereof.

It was in recognition both of the evasiveness of the device of "options," and, the huge sums invested therein, that brought about Congressional recognition of "options" in the 1946 amendment (App., *infra*, p. 92) to Sec. 27 of the Act, and, with **an acreage limitation thereon,** when taken for the purpose of geological or geophysical exploration, such permissible holding of "options" not to count against the acreage limitation on holdings of leases. Besides limiting the term of an "option" to two years without the approval of the Secretary, the Act did not require that "options" be filed with, or approved by, the Secretary, but only that an optionee should file a sworn declaration, semi-annually, with the Secretary, giving certain data with reference to **all options** held by the optionee within each respective State, which data were to include the number of acres covered by each "option". It will thus be seen that the recognition and regulation of "options", was primarily brought about as a means of buttressing the provisions of the Act imposing acreage limitations on control of leases, and, at the same time, facilitating geological and geophysical exploration of lands.[82]

We wish to impress upon the Court the fact that the Act did not require the filing of option agreements

[82] The Committee Report to Congress, on the proposed 1946 Amendment to Sec. 27 of the Act (*supra*, p. 76 footnote 76) has only this comment, with respect to the reference to "options", P. 3: "Modern technology of the industry is recognized by permitting the taking of nonrenewable options for geological or geophysical examinations of prospective areas, such options being limited to a duration of 2 years and to an area of not more than 100,000 acres in any one state. Adequate provision is made for semi-annual reporting of such options held by each optionee . . ."

with the Secretary, much less his approval (except as to a term in excess of two years), but, only required the furnishing of certain data, concerning all options so held. We submit that to the extent that options could be said to be a "concomitant" of the "policy" of the Act as opposed to monopolies, the foregoing discloses that the Congressional recognition of the device of "options" in no way requires the conclusion of the majority below that "uniformity" is necessary in the law applicable to such agreements. We submit that there is even less reason in this respect, for the conclusion so reached, than in the case of "assignments" of leases, and, we further submit that we have adequately demonstrated the error of the second opinion in its similar conclusion as to "assignments."

* * * * * *

In neither of the two opinions below, did the majority find any error in the manner in which District Judge J. Skelly Wright resolved the issues in accordance with local law, assuming local law were applicable thereto. The fact that he was entirely correct in this respect, is manifest from the decision by the State Supreme Court in *Hayes v. Muller*, 245 La. 356 (p. 373 On Rehearing), 158 So. (2d) 191 (1963), decided while this case was pending in the Court of Appeal. Moreover, Circuit Court Judge Wisdom held that District Judge Wright, had correctly decided the case. Judges Wright and Wisdom were both trained in the Civil Law, which prevails locally.

H. CONCLUSION.

For the reasons stated, the decision of the majority below should be set aside, the decision of the District Court should be reinstated as the judgment of this Court, and

the matter remanded for further proceedings in accordance therewith.

Respectfully submitted,

C. ELLIS HENICAN,
MURRAY F. CLEVELAND,
Suite 2601, 225 Baronne Street,
New Orleans, Louisiana 70112;

H. M. HOLDER,
1300 Beck Building,
Shreveport, Louisiana 71101,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I, C. Ellis Henican, hereby certify that a copy of the foregoing Brief For Floyd A. Wallis, was served upon Counsel of Record, representing Respondent, Patrick A. McKenna, and, representing Respondent, Pan American Petroleum Corporation, and the Solicitor General, Department of Justice, Washington 25, D. C., by enclosing each such copy in an envelope, duly addressed to each such Counsel of Record and the Solicitor General, at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this ..... day of December, 1965.

.....

Counsel of Record for Petitioner.

APPENDIX.

Additional Statutes Involved.

1. Mineral Leasing Act of 1920:[1]

(Act of Feb. 25, 1920; 30 U.S.C. 181, et seq.)

Sec. 1 That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privilege to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands

[1] Wallis' oral agreement with McKenna, was had in March 1954, and this was confirmed by letter agreement in Dec. of 1954. The option agreement with Pan Am was in March, 1955. *Unless otherwise noted*, these provisions of the Act are set forth as they read, at the time of these agreements. Only Sec. 27 was amended by the Act of Aug. 2, 1954 and it is set forth prior to, and, after this amendment.

leased or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof. (30 U.S.C. 181.)

Sec. 17 (as amended by Act of Aug. 21, 1935) * * *

Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 14 of this title, shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancelation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act. (30 U.S.C. 226.)

Sec. 18 (as originally enacted). That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior

to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: Provided, * * **

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All

leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear; subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: Provided, * * * (30 U.S.C. 227.)

Sec. 27 (as amended by Act of Aug. 8, 1946) No person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres for each of said minerals; and no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or association or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether

or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however*, That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised within two years after the passage of this Act. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said date (1) name of optionor and serial number of lease or application for lease,

(2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased,

trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Acts of June 1, and June 3, 1948) No person, association or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State; and no person, asso-

ciation, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest

of any optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however*, That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised on or before August 8, 1950. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the

leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of

such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Act of Aug. 2, 1954) No person, association, or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, except that in the Territory of Alaska no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate one hundred thousand acres granted hereunder; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or

permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitations provisions of any section of this Act. No such option shall be entered into for a period of more than three years, without the prior approval of the Secretary of the Interior, and no person, association, or corpora-

tion shall hold at one time such options of more than two hundred thousand acres in any one State. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which

may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 28. Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition

that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. (30 U.S.C. 185.)

Sec. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted

at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare; Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (30 U.S.C. 187.)

Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as

to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this Act of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however*, That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of a part of a legal subdivision. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary terms of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made

of parts of leases which are in their extended term because of production, and the segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities. (30 U.S.C. 187a.)

Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary line of any structure, or oil or gas field, for the purposes of this Act: Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (30 U.S.C. 189.)

2. Mining Law:

(30 U.S.C. 26, 28; R.S. 2322, 2326)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their

entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. R.S. § 2322.

§ 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the

10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. § 2324; Feb. 11, 1875, c. 41, 18 Stat. 315; Jan. 22, 1880, c. 9, § 2, 21 Stat. 61; Aug. 24, 1921, c. 84, 42 Stat. 186.